

**The Globalization of Crime Control:  
The Use of Non-criminal Justice Responses for  
Countering Organized Crime**

**Bjarni Halldor Sigursteinsson**

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## Abstract:

This thesis examines domestic authorities' use of non-criminal justice responses<sup>1</sup> to counter organized crime. Examples of responses used to counter outlaw motorcycle<sup>2</sup> gangs in Canada, Germany, and Iceland are provided. These responses are significantly different from most international efforts focusing on criminal norms and cooperation in criminal matters.

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<sup>1</sup> For the purpose of this work, the term 'non-criminal justice responses' will be used in accordance with the following definition:

non-criminal justice responses are neither intended to bring about criminal punishment, nor to carry out any criminal punishment. However, failing to comply with these responses or conditions laid out by them, might bring about criminal liability, without such criminal sanctions being the purpose of these responses as such. Therefore, non-criminal justice response might have one or more institution of the criminal justice system as part of the process, (such as police, prosecution, etc.) or be entirely initiated, executed and controlled by such institutions. However, the actions taken are neither based on the criminal law nor legislations intended to bring about or execute criminal sanctions.

An example would be the check stops in Canada, where the police sets up check stops based on the traffic law and apparently to collect intelligence about individuals suspected of being involved in organized crime. Therefore, these efforts are neither based on the criminal law, nor intended to bring about prosecution for any particular offence under the criminal law.

Another example would be the civil law orders in Australia, where known members of declared outlaw motorcycle can be issued a control order, restricting their ability to associate, take on particular occupation or stay in particular location. Non compliance with these control orders bring criminal sanctions, without though the criminal sanctions being the main purpose of the orders, but rather to reinforce the preventive control orders.

Consequently, the term 'non-criminal justice responses' excludes both 'criminal law responses' and 'criminal justice responses'. This study has found there to be a confusion in the use of the terms 'criminal law responses' and criminal justice response, for the sake of clarity, this work will rely on the following use of these terms:

'Criminal Law Responses' are only those responses that are based directly on the Criminal Law.

'Criminal justice responses', include criminal law responses, but additionally, include all the responses utilized by the criminal justice system for the purpose of enforcing the criminal law. These could be actions taken by authorities, such as detention and arrest for investigative purposes, search and seizure, etc. (potentially based on parts of the criminal procedural law, law about the judiciary, policing acts, etc.) Additionally, responses intended to execute sanctions, by bringing about and manage the punishment that has been decided (potentially based on laws and regulations governing payment of fines, incarceration, disposal of criminally forfeited assets, etc.) These responses are generally based on legislations intended for the purpose of upholding the criminal law, to bring about punitive actions of the criminal law, and for the management of any punitive actions.

<sup>2</sup> Outlaw Motorcycle Gangs (OMCG) is a form of organized crime, known for utilizing intimidation and violence to further the gang's interests. Outlaw Motorcycle Gangs originate from the motorcycle culture of Northern America after the Second World War, but have increasingly become involved in ever more sophisticated forms of organized crime, including drug trafficking, prostitution and extortion. Outlaw motorcycle gangs are distinctive from many other forms of organized crime in that member generally do not hide their involvement with the gang, in fact members generally wear insignia on their clothing that indicates their involvement with the gang.

See for example: Quinn, James F, 'angels, bandidos, outlaws, and pagans: the evolution of organized crime among the big four 1% motorcycle clubs' (2001) 22 *Deviant Behavior*, 379; Barker, Tom, 'American Based Biker Gangs: International Organized Crime' (2011) 36 *American Journal of Criminal Justice*, 207; Gomez del Prado, Grégory, 'Outlaw motorcycle gangs' attempted intimidation of Quebec's police forces' (2011) 12 *Deviant Behavior*, 66; Librett, M, 'Wild pigs and outlaws: The kindred worlds of policing and outlaw bikers' (2008) 4 *Crime, Media, Culture*, 257.

As harmonization of legislation, policies and practices in this field become an international focus, I examine the role currently played by the European Union in promoting these non-criminal justice 'alternative' enforcement strategies for the purpose of furthering the development of international and domestic efforts to counter organized crime.

This study concludes that the European Union is, in fact, promoting this approach through International Soft Law. The thesis then examines whether there are the same concerns pertaining to matters such as due process and democratic principles as previously raised with international efforts to suppress organized crime within the field of Transnational Criminal Law.

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## **Dedication**

To my wife and our children who inspired me to take on this journey. I am grateful that we have been fortunate enough to tackle these adventures together, outside of our comfort zone, and our country.

## Acknowledgements

I want to acknowledge with gratitude the support and guidance of my supervisor, Dr. Margaret E. Beare.

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# Introduction

Transnational crime has been described as one of the major issues for policy making, crime control and policing for the 21st century.<sup>3</sup> The rise in ‘transnational crime’<sup>4</sup> has been considered to be the consequence of globalization, or at least facilitated by an increased frequency and ease of: travel, trade, movement of capital and communications. Subsequently, the problem that transnational crime presents has been said to be one that can no longer be dealt with by domestic authorities in each country individually, because how law enforcement and judicial authority are still fundamentally linked to sovereignty and limited by nation state borders.<sup>5</sup> With transnational crime being less and less limited by borders of nation states, an international effort is needed to counter the problem — i.e. to prevent those involved in these kind of crime from being able to operate out of safe havens and further their operations by selective use of favourable jurisdictions. In the foreword of the Palermo Convention<sup>6</sup> Kofi Annan Secretary-General of the UN clearly states his view of ‘transnational organized crime’<sup>7</sup> as a global threat that has to be met with a global response.<sup>8</sup>

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<sup>3</sup> Louise I. Shelley, Terrorism, Transnational Crime and Corruption Center’s website, front page. <[www.policy-tracc.gmu.edu/](http://www.policy-tracc.gmu.edu/)> Accessed 8 January 2011.

<sup>4</sup> ‘Transnational crime’ is a Criminological term that has been defined by Mueller, as: “. . . certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country.” Mueller, Gerhard O W, ‘Transnational crime: Definitions and Concepts’ in P Williams and D Vlassis (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (Frank Cass 2001), 13. As cited in Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953, at p 954. The term has been claimed to be an umbrella term for variety of criminal behaviour, including organized crime. See: Fijnaut, ‘Transnational Crime and the role of the United Nations’, 8 European Journal of Criminal Law and Criminal Justice (2000) 119, at 120. As cited in Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953, at p 954.

<sup>5</sup> Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime, August 2009), p 262, 293 and 298 - 299. Smith, Jennifer M, ‘An International Hit Job’ (2009) 97 The Georgetown Law Journal, 1111, at p 1112 - 1116. Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010) p 22. United Nations Convention against Transnational Organized Crime (United Nations November 15, 2000), p 2. United Nations News Centre, ‘Countries ignorant about threats posed by transnational crime – UN agency chief’ (UN News Centre, April 23, 2007)

<sup>6</sup> The Palermo Convention is what the ‘United Nations Convention Against Transnational Organized Crime’ is frequently called both by practitioners and academics, as the convention was signed in Palermo Italy. United Nations Convention against Transnational Organized Crime (United Nations November 15, 2000).

<sup>7</sup> ‘Transnational organized crime’ is a term that has been used about organized crime that are transnational or have been considered to have transnational aspect. There seems however not to be any agreed up on definition. The kind and degree of the transnational aspect needed for organized crime to be considered ‘transnational organized crime’



The call for global response has been answered, with a number of initiatives for countering organized crime at both the transnational and the international level, including the creation of international legal instruments to suppress the criminal activity. The most significant of these international legal instruments are the UN ‘Palermo Convention’ in 2000, and two international legal instruments introduced by the European Union: ‘Joint action of 21 December 1998’ and ‘The Organized Crime Framework Decision’ from 2008.<sup>9</sup>

The international efforts for countering transnational and organized crime by use of ‘International Law’ have been the focus of a healthy academic discussion. ‘Transnational Criminal Law’ has been claimed to be a complementary legal term for the criminological term ‘transnational crime’<sup>10</sup> and a “doctrinal match” in the field of law.<sup>11</sup> Claiming Transnational Criminal Law to be the venue for discussing ‘transnational crime’ within the field of law. Consequently, the field of ‘Transnational Criminal Law’ has become an important venue of academic discussion about international efforts for countering transnational and organized crime.<sup>12</sup>

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is unclear. ‘Transnational organized crime’ is by definition to be considered to fall under the criminological term ‘transnational crime’, See definition of ‘transnational crime’ in fn 4.

<sup>8</sup> Annan, Kofi A, Foreword of the United Nations Convention against Transnational Organized Crime p iii – iv. <<http://www.unodc.org/>> Accessed 8 January 2011.

<sup>9</sup> United Nations Convention against Transnational Organized Crime (United Nations November 15, 2000); The Organized Crime Framework Decision [2008] OJ L300/42; Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime [1997] OJ L344/7.

<sup>10</sup> This work will use Boister’s simplified definition for the term ‘transnational crime’: “. . . transnational crime describes conduct that has actual or potential trans-boundary effects of national and international concern.” Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953, at 954. Boister cites: Mueller, Gerhard O W, ‘Transnational crime: Definitions and Concepts’ in P Williams and D Vlassis (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (Frank Cass 2001), 13; Fijnaut, C, ‘Transnational crime and the role of the United Nations in its Containment through international cooperation: A challenge for the 21st century’ [2000] Eur J Crime Crim L & Crim Just, 119.

<sup>11</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953, at p 953 – 954.

<sup>12</sup> See for example: Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009); Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010).

Preliminary study suggests there to be an important difference between national and international efforts for countering organized crime, a difference that seems to have gone largely unnoticed by the academic discussion about international efforts for countering organized crime.

Academic discussion within the field of Transnational Criminal Law focuses on formal ‘criminal justice responses’<sup>13</sup> to organized crime. For example, Neil Boister, who relabelled part of the ‘International Criminal Law’<sup>14</sup> as ‘Transnational Criminal Law’ in 2003, defined the term as “. . . the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects.”<sup>15</sup> This definition raises concerns for being too narrow and exclusive, by excluding the influence of international ‘soft law’<sup>16</sup> and responses based in other fields of law such as administrative and civil law, which I will examine. It is evident that domestic authorities utilize not only criminal law and criminal justice responses in their efforts to counter organized crime, but also a variety of non-criminal justice responses, perhaps in particular when dealing with ‘outlaw motorcycle gangs’.

This apparent difference between domestic and international efforts raises important questions as to whether there is a disconnect between practitioners tasked with countering organized crime, national and supranational policymakers in the field, and the academic discussion about organized crime. This raises three questions: Is there an increase in the utilization of non-criminal justice responses at the domestic level? If so, have these enforcement strategies failed to reach the attention of policymakers at the international level. We might question why academic discussion has not examined this apparent difference in approach between the domestic and the international efforts. Finally, I question whether lack of

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<sup>13</sup> See fn 1 for definition of criminal justice responses vs. non-criminal justice responses.

<sup>14</sup> ‘International Criminal Law’ “. . . is the primary international legal regime that addresses the atrocities of war and other forms of inter-social conflict in the hope of providing accountability, which in turn is expected to lead to the prevention of conflict and to the enhancement of peace prospects.” Bassiouni, M Cherif, *Introduction to International Criminal Law, 2nd Revised Edition* (Brill 2012), at p cxxi. See also: Bassiouni, M Cherif, ‘The sources and content of international criminal law: a theoretical framework’ in M Cherif Bassiouni (ed), *International Criminal Law, Volume I: Sources, Subjects, and Contents* (Martinus Nijhoff Publishers / Brill Academic 2008), 3; Currie, Robert J, *International and transnational criminal law* (Irwin Law 2010), at p 17 – 19.

<sup>15</sup> Boister, N, ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law*, 953 at p 955. Importantly however he limits the “indirect suppression by international law” with ‘Suppression Conventions’ – suggesting a formal convention has to be in place between the states involved.

<sup>16</sup> See on hard and soft International Law: Dixon, Martin, *Textbook on International Law* (5 edn, Oxford University Press 2013).

See on International Soft Law: Guzman, Andrew T, and Timothy L Meyer, “‘International Soft Law’ by Andrew T. Guzman, et al.’ (2010) 2 *Journal of Legal Analysis*, 171; Ho, Daniel E, ‘Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?’ (2002) 5 *Journal of International Economic Law*, 647.

knowledge, about domestic use of non-criminal justice responses, might have hindered the development of efforts to incorporate these responses into an international more formalized set of recommended responses to organized crime — and if such recommendations may raise fewer concerns than the system of Transnational Criminal Law and the less formal transnationalization of non-criminal justice responses, suspected to exist. The answer is not straightforward. While the system of Transnational Criminal Law has been seen to focus on harmonization of domestic criminal norms and academic knowledge about non-criminal justice responses seems to be limited, and largely absent from discussion about international efforts for countering organized crime – pluralist legal thinking suggests there to be important practical and theoretical difficulties with transnationalization of domestic approaches and norms. Importantly, legal pluralism shows there to be important practical and theoretical difficulties with the creation of universal norms.<sup>17</sup> Furthermore, pluralism emphasizes the importance of interdisciplinary understanding of law in its appropriate context within and outside the legal discipline.<sup>18</sup>

The study starts by reviewing academic literature on organized crime responses within the field of Transnational Criminal Law, continues by reviewing literature on pluralism in global governance as an alternative to the emphasize on harmonization within the field of Transnational Criminal Law, and ends with reviewing academic literature on non-criminal justice responses to organized crime. Following the literature component, this study examines how non-criminal justice responses are being utilized by domestic authorities to counter organized crime. For practical purposes, the examination will be limited to responses utilized for countering outlaw motorcycle gangs in three countries: Canada, Germany and Iceland, as this study is limited in space and time. Second, the study examines if non-criminal justice responses are being promoted under International Law. Finally, I examine if concerns should be raised with compatibility of the transnationalization of non-criminal justice responses with fundamental principles of law, Human Rights and good governance. The examination will rely on the concerns Boister raised with the system of Transnational Criminal Law, while adding one

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<sup>17</sup> Walker, Neil, 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies, at p 533 - 541; Krisch, Nico, 'The Case for Pluralism in Postnational Law' [2009] Law Society and Economy Working Papers, at p 7 - 9 and 40 - 45.

<sup>18</sup> Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 Global Constitutionalism, 16, at p 51.

concern found to be of importance from the discussion about the international efforts of the European Union in the Area of Freedom, Security and Justice.

Some concluding remarks will be offered, attempting to bring the findings into context and showing their importance for the discussion about transnationalization of crime control and criminal norms.

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## Methods

This thesis starts with a threefold literature review. The first part provides an overview of the literature on international efforts for countering organized crime in the field of Transnational Criminal Law, then continues by providing an account of how pluralist legal thinking as an alternative to the focus by the international community via Transnational Criminal Law on harmonization of norms, affects legal studies. Finally an overview is provided of the literature on non-criminal justice responses utilized domestically for the countering of organized crime. The understanding acquired will serve as a basis for studying the presumed difference between domestic and international efforts for the countering of organized crime. Furthermore, the overview of existing literature is expected to provide knowledge of the concerns raised with both approaches, capable of providing the basis for assessing if the promotion of non-criminal justice responses under International Law would be likely to raise lesser concerns than the current promotion of criminal justice responses raises.

The first phase of the research, the research into the utilization of non-criminal justice responses for countering organized crime by domestic authorities in Canada, Germany and Iceland, was limited to the kind of organized crime generally referred to as outlaw motorcycle gangs.<sup>19</sup>

The selection of outlaw motorcycle gangs for studying the utilization of non-criminal justice responses for the countering of organized crime was initially dictated by the author's existing knowledge of non-criminal justice responses being utilized to counter outlaw motorcycle gangs perceived by authorities to be part of the local organized crime problem. Furthermore, information about outlaw motorcycle gangs is more readily available than with most other kinds of organized crime. Members do not hesitate to identify themselves with the gangs and express themselves as gang members, as well as adhering to a culture with highly visible insignia and running club houses under the gangs insignia.

In order to research the enforcement of outlaw motorcycle gangs, data collection was based in part on the snowball method. The author contacted personal contacts acquired as a

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<sup>19</sup> See definition of outlaw motorcycle gangs in fn 2.

police officer, all of which were at the time working as practitioners in law enforcement. These contacts then introduced the author to other law enforcement practitioners that would be able to inform the author further about the subject of the research. The process would then repeat itself.

All the law enforcement practitioners were tasked with countering organized crime in some form, they were therefore able to inform of measures and approaches used by law enforcement authorities to counter organized crime in one or more of the countries covered by this research.

The contacts were asked to inform the author of any responses they knew to be utilized for countering organized crime (specifically outlaw motorcycle gangs), regardless of their legal basis or whether the responses were utilized in their own jurisdiction or not. The contacts were informed that the author was particularly interested in non-criminal justice responses. The contacts were asked to provide citable sources, but these practitioners frequently did not have their information from publicly available sources and access might be restricted to their own sources.

The contacts were assured that they would not be cited on the information they gave. Furthermore, the contacts were assured that the measures they brought to the authors attention would not be discussed in this work, unless on the basis of some citable information that would provide the evidence for the use of these measures. Also, all the contacts were guaranteed anonymity.

This method provided a valuable knowledge about variety of non-criminal justice responses that were being utilized to counter outlaw motorcycle gangs. Media search, without the guidance provided by the contacts, would presumably have generated some information but the evidence on the use of other less publicly visible responses would have remained hidden.

Logically, it is easier to find evidence for something the existence of which is known, than to look for everything that might be expected to exist, knowledge of a specific approach or kind of measures makes it easier to recognize evidence of it when one comes across such evidence. Consequently, knowledge of use of specific responses in one country would make a search for such responses in another country easier, e.g. because of better knowledge of how such responses looks like when implemented. Iceland was a natural country to focus on first due to the author's existing knowledge of organized crime responses there. Germany brings the focus on one of the leading member states of the European Union, the Union arguably being the

main actor in transnationalization of criminal norms, also, Germany is known to have tried to ban criminal organizations. Finally, the study is conducted in Canada, where responses for countering organized crime seem to be under influence from both developments in Europe and the United States of America.

Based on the information from the contacts five different searches were made for publicly available information for the use of the non-criminal justice responses now known to be used to counter organized crime by domestic authorities.

First, a focused media search was conducted for publicly available information showing the use of responses in line with those described by the contacts as being utilized by domestic authorities. This search was not limited to the countries being studied, but was limited by the language knowledge of the author. This search was intended to inform of variety of responses being utilized to counter organized crime.

Second, a more focused search was conducted, now limited to the three countries being studied, Canada, Germany and Iceland. This search was guided by the knowledge of existing non-criminal justice responses to organized crime, acquired from the contacts and the previous media search. The author then assessed if each response should be considered to be a non-criminal justice response. For the purpose of this assessment, 'non-criminal justice responses' were considered neither to be intended to bring about criminal punishment, nor to carry out any criminal punishment. However, failing to comply with these responses or conditions laid out by them, might bring about criminal liability, without such criminal sanctions being the purpose of these responses as such. Therefor, non-criminal justice response might have one or more institution of the criminal justice system as part of the process, (such as police, prosecution, etc.) or be entirely initiated, executed and controlled by such institutions. However, the responses as such are neither based on the criminal law nor legislations intended to bring about or execute criminal sanctions.<sup>20</sup>

Finally, a search was made for case law dealing with the non-criminal justice responses found to be utilized in the three countries included in this study.

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<sup>20</sup> See my definition of non-criminal justice responses vs. criminal justice responses in fn 1.

A second research was then conducted, on the basis of the acquired knowledge of non-criminal justice responses being utilized by domestic authorities for countering organized crime – this time for evidence of non-criminal justice responses being promoted at the international level. The purpose is to see if the utilization of non-criminal justice responses by domestic authorities is influencing the approach taken by international efforts for countering organized crime.

The research was conducted by utilizing the document search engines of the European Union and the United Nations, these two being the main international bodies involved in the suppression of organized crime at the international level according to the Transnational Criminal Law literature review. The search engines were utilized to search for evidence of any promotion of non-criminal justice response for the purpose of countering organized crime, such as outlaw motorcycle gangs. The knowledge of non-criminal justices being utilized by domestic authorities for countering organized crime, gained in the first part of the research, was used to guide the search for any international promotion.

Finally, the study developed a test to examine if the promotion of non-criminal justice responses would be likely to meet less criticism for incompatibility with fundamental principles of law and good governance than the system of Transnational Criminal Law currently does. The test is intended to indicate if the domestic approach of utilizing non-criminal justice responses for countering organized crime should be influencing international efforts for the same purpose. The test is developed from the main concerns raised for incompatibility of the system of Transnational Criminal Law with fundamental principles of law and good governance, in addition to the concern raised with lack of sound knowledge as a basis for policymaking.

## **Known limitations of this Method**

Known weaknesses of the method have primarily to do with the initial research for non-criminal justice responses being utilized by domestic authorities. These concerns include that the contacts are unlikely to have revealed all measures they knew to be used by authorities to counter organized crime. Adding to the potential incompleteness of the research, due to confidentiality requirements, no measures are being discussed in this work, for which the author did not find



publicly available information. Consequently, the sample of non-criminal justice responses presented here should not be seen as a complete sample of such responses used by authorities in the countries covered in this research.

Ideally this kind of research would benefit from being conducted in cooperation with multinational or international institutions that are involved in crime control, capable of facilitating the information sharing. Attempt was made to secure cooperation with both the European Police Institute and the United Nations Office on Drugs and Crime. Unfortunately, neither institution was able to provide full access to their data. Although, both institutions deserve thanks for the information shared and support shown.

The United Nations Office on Drugs and Crime shared its publication called "Digest of Organized Crime Cases" that is a compilation of cases dealing with organized crime.<sup>21</sup> However, examination showed the publication to be limited to criminal justice responses, excluding non-criminal justice responses, such as for example civil and administrative measures.

Of the three languages of the three countries studied in this work the author only has sufficient knowledge for academic work in two. Therefore assistance had to be received in working with material in German, in which the author has only limited competence. Also, information received had frequent references to measures used in other countries than those being studied, often in variety of languages. The author's ability to read all the Scandinavian languages except Finnish was therefore an asset, but inability to read languages such as French, Italian and Dutch proved to be a weakness. Therefore, this methodology might be more comprehensible for a group of researchers that together have proficiency in wider variety of languages.

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<sup>21</sup> 'Digest of organized crime cases' (United Nations Office on Drugs and Crime, 16 October 2012). <[http://www.unodc.org/documents/organized-crime/ebook\\_E.pdf](http://www.unodc.org/documents/organized-crime/ebook_E.pdf)> Accessed 17 October 2012. See also about the project at: The United Nations Office on Drugs and Crime (UNODC) official website: <<http://www.unodc.org/unodc/en/organized-crime/digest-of-organized-crime-cases.html>> accessed 17 October 2012.

## Literature review

Transnational crime have been described by academics as a major global issue. In the words of Louise I. Shelley, a well known scholar in this field:

“Transnational crime will be a defining issue of the 21st century for policymakers - as defining as the Cold War was for the 20th century and colonialism was for the 19th. Terrorists and transnational crime groups will proliferate because these crime groups are major beneficiaries of globalization. They take advantage of increased travel, trade, rapid money movements, telecommunications and computer links, and are well positioned for growth.”<sup>22</sup>

Organized crime is considered to be a part of this Transnational Crime issue. Increasingly transnational organized crime is considered to be a problem that can no longer be dealt with by domestic authorities in each country individually, but that an international effort is needed to counter the problem—i.e. via ‘harmonization’ of the way that individual countries deal with the enforcement issues as well as with increased cooperation and joint efforts.<sup>23</sup> In the foreword of the Palermo Convention, Kofi Annan, Secretary-General of the UN, clearly states that transnational organized crime<sup>24</sup> is a global threat that has to be met with a global response.<sup>25</sup>

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<sup>22</sup> Louise I. Shelley, Terrorism, Transnational Crime and Corruption Center’s website, front page <[www.policy-traccc.gmu.edu/](http://www.policy-traccc.gmu.edu/)> Accessed 8 January 2011.

<sup>23</sup> Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 262, 293 and 298 - 299. Smith, Jennifer M, ‘An International Hit Job’ (2009) 97 The Georgetown Law Journal, 1111, at p 1112 - 1116. Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010) p 22. United Nations Convention against Transnational Organized Crime (United Nations November 15, 2000), p. 2. United Nations News Centre, ‘Countries ignorant about threats posed by transnational crime – UN agency chief’ (UN News Centre, April 23, 2007) <<http://www.un.org/apps/news/printnewsAr.>> accessed 2 April 2014

<sup>24</sup> ‘Transnational organized crime’ is a term that has been used about organized crime that are transnational or have been considered to have transnational aspect. There seems however not to be any agreed up on definition. The kind and degree of the transnational aspect needed for organized crime to be considered ‘transnational organized crime’ is unclear. ‘Transnational organized crime’ is by definition to be considered to fall under the criminological term ‘transnational crime’, see definition in footnote 4.

<sup>25</sup> Kofi A. Annan, Foreword of the United Nations Convention against Transnational Organized Crime p iii – iv <<http://www.unodc.org/>> Accessed 8 January 2011.

The European Union responded at a regional level in 1998 with the Joint Action, making it a criminal offence to participate in a criminal organization within its member states. Again in 2008, it adopted the Framework Decision on the fight against organized crime.<sup>26</sup> The United Nations responded on the international level with the United Nations Convention against Transnational Organized Crime, better known as the Palermo Convention in 2000.<sup>27</sup>

The Palermo Convention has established organized crime as a crime under International Criminal Law.

Public discussion tends to identify International Criminal Law with crime such as genocide, crimes against humanity, war crimes and crimes of aggression, i.e. the crime that now fall under the jurisdiction of the International Criminal Court. Neil Boister has however emphasized that the so-called treaty crime are much greater in number than the crimes under International Criminal Law *stricto sensu*.<sup>28</sup> Treaty crime being crime that have been established by international treaties where states agree to criminalize specific conduct.<sup>29</sup>

## **Transnational Criminal Law – a field within International Criminal Law**

Boister and others claim it to be necessary to distinguish between International Law that deals with International Crime *stricto sensu* and the part of International Criminal Law that deals with crime that have become familiar to public discussion as Transnational Crime.<sup>30</sup>

Boister notes that Transnational Crime is a criminological rather than juridical term, created “in order to identify certain criminal phenomena transcending international borders, transgressing the law of several states or having an impact on another country”<sup>31</sup>. However, he

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<sup>26</sup> The Organized Crime Framework Decision [2008] OJ L300/42; Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime [1997] OJ L344/7

<sup>27</sup> United Nations Convention against Transnational Organized Crime (United Nations November 15, 2000)

<sup>28</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953 at 956.

<sup>29</sup> Currie, Robert John, *International and transnational criminal law* (Irwin Law 2010), at p 15 - 16.

<sup>30</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953. Currie, Robert John, *International and transnational criminal law* (Irwin Law 2010), at p 12 - 21.

<sup>31</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953 at p 955.

sees it as problematic that this term is unknown to international lawyers, who would use terms such as ‘crime of international concern’ and ‘common crimes against internationally protected interests’.<sup>32</sup> Boister therefore suggests a legal term for the system of international law that suppresses ‘transnational crimes’.

Boister claims to build on Philip Jessup’s use of the phrase “transnational law” as describing “all law which regulates actions or events that transcend national frontiers”.<sup>33</sup> Boister states that he wants a more restricted use of the term Transnational Criminal Law than had previously been used. He claims the term traditionally to have been used to describe all criminal law that were not entirely confined to its nation state, in line with Jessup’s definition of “transnational law”.<sup>34</sup> Boister defined Transnational Criminal Law as “the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects.”<sup>35</sup> Focusing on the network of treaties between states that suppress “socially, economically and morally undesirable inter- and intra-state conduct” through domestic penal law.<sup>36</sup>

Boister does not discuss why he restricts his definition of Transnational Criminal Law to treaties suppressing activity through domestic penal law. By so doing he seems to omit other kinds of domestic legislations than penal law that may be used to suppress “socially, economically and morally undesirable inter- and intra-state conduct”<sup>37</sup>. It seems contradictory for Boister to create a term to facilitate interdisciplinary discussion with other disciplines, but at the same time to limit the discussion to a specific field within the legal discipline itself. The limitation of the term to domestic penal law seems, partially at least, to defeat the purpose of facilitating interdisciplinary discussions.

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<sup>32</sup> Ibid

<sup>33</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953 at p 954. Citing Philip Jessup, *Transnational Law* (New Haven: Yale Univ. Press, 1956), at p 2.

<sup>34</sup> Boister cites for this use of Transnational Criminal Law: A. Eser and O. Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law* (1992), at v; Clark, ‘Countering Transnational and International Crime: Defining the Agenda’, in P. J. Cullen and W. C. Gilmore (eds), *Crimes Sans Frontieres: International and European Approaches: Hume Papers on Public Policy Vol. 6, nos 1 and 2* (1998) 20. Boister cites Philip Jessup for his definition of ‘Transnational Law’: See P. Jessup, *Transnational Law* (1956), at 2. See generally, O. Schachter, ‘Phillip Jessup’s Life and Ideas’, 80 *AJIL* (1986) 878, at 893–894.

<sup>35</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953 at p 955.

<sup>36</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953, at p 955 - 956.

<sup>37</sup> Ibid p 956.

Both Boister and Robert J. Currie refer to the treaties that form Transnational Criminal Law as ‘suppression conventions’.<sup>38</sup> Consequently, both of them seem to limit Transnational Criminal Law to suppression through formal treaties under international law, as opposed to soft law.<sup>39</sup> By so doing they exclude varieties of soft law such as non-binding agreements, recommendations, or agreed up on road maps that might be highly influential on the state parties. Boister explains that the offences established by these suppression conventions, together with what he calls International Criminal Law *stricto sensu*, were considered to fall within the broad system of International Criminal Law. The difference being that offences established by the suppression conventions only brought with them domestic criminal liability for individuals, and in fact only after the relevant member state ratified the convention by enacting such liability into domestic law. While International Criminal Law *stricto sensu* “. . . provide for individual penal responsibility for violations of international law before an international penal tribunal.”<sup>40</sup>

Currie explains that by establishing suppression conventions the states agree to two objectives. First, the objective to cooperate with each other to prevent offenders from finding safe havens from prosecution in the other contracting states, and second to reinforce law enforcement powers of the contracting states to suppress the activity made criminal under the convention by way of joint effort.<sup>41</sup> Currie furthermore states these conventions place three main types of obligations on the contracting states to achieve these objectives.<sup>42</sup> First, state parties must criminalize the kind of conducts that falls under the convention. Second, they must take jurisdiction over offences and offenders under the convention both territorially and extraterritorially, including amending domestic law accordingly. And last, state parties must accept the legal principle of *aut dedere aut judicare*, meaning that they have to either prosecute offenders under the convention or extradite them to state parties willing to do so. The Palermo convention is a case in point. The convention obligates state parties to criminalize specific

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<sup>38</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953 at p 955. Currie, Robert John, *International and transnational criminal law* (Irwin Law 2010), p 19.

<sup>39</sup> See further on hard and International Soft Law: Dixon, Martin, *Textbook on International Law* (5 edn, Oxford University Press 2013) p 47 - 48.

<sup>40</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953 at p 955.

<sup>41</sup> Currie, Robert John, *International and transnational criminal law* (Irwin Law 2010), at p 19.

<sup>42</sup> Ibid

conduct under articles 5, 6, 8 and 23, take jurisdiction under article 15 and at last the principle of *aut dedere aut judicare* is to be found under article 16.

Boister discusses the following three main reasons for the need to bring increased focus on this system of International Law that he calls Transnational Criminal Law.

His first reason is that Transnational Crime is a rapidly growing phenomenon<sup>43</sup> and that as a response to this growth the number of suppression conventions have grown rapidly to over 200 such treaties<sup>44</sup>, making Transnational Criminal Law “probably the most significant existing mechanism for the globalization of substantive criminal norms.”<sup>45</sup> However, he argues there to be “far greater scope for legal ambiguity and abuse of rights in Transnational Criminal Law than in International Criminal Law *stricto sensu*.”<sup>46</sup> This reason has only grown to become more relevant and pressing today than when Boister wrote his article more than ten years ago. There has been substantive development in the supranationalization of criminal law within the European Union after Boister made this claim. For example after the Lisbon Treaty in 2007 the European Union has now the ability to introduce European criminal law and although greatly limited, one of the subject matter where it has legislative competence is organized crime.<sup>47</sup> Additionally the Lisbon Treaty provides that the union can now establish a European Public Prosecutor's Office who's power's can be extended ” . . . to include serious crime having a cross-border dimension . . . ”<sup>48</sup>

Secondly, Boister claims studies of Transnational Criminal Law have been neglected, contributing to the lack of doctrinal basis for this field of law, “. . . where sovereignty is still a dominant value but somewhat contradictorily, interstate cooperation is often extensive although

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<sup>43</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953 at p 956. Citing: Fijnaut, ‘Transnational Crime and the role of the United Nations’, 8 European Journal of Criminal Law and Criminal Justice (2000) 119, at p 122.

<sup>44</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953, at p 956. Citing: Bassiouni, M. Cherif, ‘The Sources and Content of International Criminal Law: A Theoretical Framework’, in Bassiouni ed, *International Criminal Law* 2 ed (1999) at p 32-33 and 62-69, for the full list of treaties.

<sup>45</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953 at p 956.

<sup>46</sup> Ibid

<sup>47</sup> Herlin-Karnel, Ester, ‘What Principles Drive (or Should Drive) European Criminal Law’ (2010) 11 German Law Journal, 1115, at p 1116 – 1117; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, part 3, title 5, chapter 4.

<sup>48</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, part 3, title 5, chapter 4, art 86.

beyond the reach of the public eye.”<sup>49</sup> This is supported by Francesco Calderoni’s and Andreas Schloenhardt’s claims that scientific studies are lacking in the field of organized crime.<sup>50</sup> They also claim legislation in the field to have been driven by particular incidents and politics rather than scientific knowledge.<sup>51</sup>

Thirdly, Boister claims relabeling is necessary, as scholars had originally mislabelled crime under the suppression conventions as crime against internationally protected interests. The relabeling would draw a clear distinction between crime that are international crime, considered to be “the most serious crimes of concern to the international community as a whole”<sup>52</sup>, and those that might be seen to be of less universal values and interests. This re-labeling being necessary to “. . . draw attention to the deficiencies of this increasingly important system.”<sup>53</sup>

Boister is concerned that the system of Transnational Criminal Law creates risk of ambiguity and risk of abuse of rights, his apprehension is based on the following six main concerns:

- Transnational Criminalization
- Legitimacy in the Development of the System
- Doctrinal Weaknesses in the System
- Human Rights Considerations
- Legitimacy in the Control of the System
- Enforcement of the System

With regards to transnational criminalization, Boister finds it dangerous to form transnational morality without holistic policy and coherency with fundamental principles.<sup>54</sup> He finds it necessary to ask questions about what constitutes the threat intended to counter and if the appropriate response at the international level is to promote penal response. He also finds the

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<sup>49</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953, at p 956 and 958 - 959.

<sup>50</sup> Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), at p 294. Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 25.

<sup>51</sup> Schloenhardt, Andreas, ‘Fighting Organized Crime in the Asia Pacific Region: New Weapons, Lost War’ (2012) 2 Asian Journal of International Law, 137, at p 164. Calderoni, Francesco, ‘Organized crime legislation in the European Union’ (Springer Verlag 2010), at p 170.

<sup>52</sup> Rome Statute of the International Criminal Court (United Nations, July 17, 1998), Art 5.

<sup>53</sup> Boister, N, “Transnational Criminal Law?” (2003) 14 European Journal of International Law, 953, at p 956.

<sup>54</sup> Ibid, at p 957.

creation of the system at the transnational level, by democracy of states, to suffer from democratic deficiency where the citizens have little to do with its adoption or application.<sup>55</sup> He is concerned of doctrinal weaknesses in the system by lack of coherency of general principles, procedures, penalties and the scope of criminal liability.<sup>56</sup> Additionally, he points out that the system does not ensure compatibility with Human Rights.<sup>57</sup> Furthermore, Boister is concerned of legitimacy in the control of the system, especially undue influence of powerful states, that he claims to have promoted the system due to their own sensitivity and vulnerability to many of the activities the system is intended to suppress.<sup>58</sup> Finally, Boister is concerned about the weak and infrequently used provisions for enforcement of Transnational Criminal Law, which he claims is an informal gradient system of inducement, the development of which was driven by few powerful states for their own purposes.<sup>59</sup>

Calderoni seems to share Boister's concern for the influence of the international legal instruments on domestic law, but rather because of lack of quality and best knowledge basis of the instruments than concerns about legitimacy.<sup>60</sup> Calderoni claims that the legal instruments introduced for the joint efforts of countering organized crime do not reflect best scientific knowledge in the field. Consequently, Calderoni is concerned that member states of the Union will be forced to amend legislations, of higher quality and stronger base in scientific knowledge, to approximate to the legal instruments of the European Union.

To summarize, common policy for countering Transnational Crime is being created at the international level, influencing and perhaps up to a point steering domestic response of the member states.<sup>61</sup> At the same time there has been an ongoing discussion about legitimacy problems in global governance, revolving *inter alia* around the democratic deficiency of the European Union, where this supranational body, created by a multinational treaty, is creating

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<sup>55</sup> Ibid, at p 957 - 958.

<sup>56</sup> Ibid, at p 958.

<sup>57</sup> Ibid, at p 959.

<sup>58</sup> Ibid, at p 959 - 960.

<sup>59</sup> Ibid, at p 960.

<sup>60</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 25.

<sup>61</sup> Baker, Estella, and Christopher Harding, 'From past imperfect to future perfect? A longitudinal study of the Third Pillar' (2009) 34 *European Law Review*. Baker, E, 'Governing through crime -- the case of the European Union' (2010) 7 *European Journal of Criminology*, 187, at p 188 - 191.



norms that either have direct effect at the domestic level or obliges member states to change their domestic law so as to conform to European Union Law.<sup>62</sup>

Boister and some likeminded scholars claim the system of Transnational Criminal Law to be a powerful system of International Law but that the system is haunted by a variety of problems. The scholars claim that these problems are caused by three main issues; academic knowledge is lacking in the field, consequently the system and the responses promoted by it are not based on best academic knowledge in the field, lack of academic knowledge in the field being an issue in its own right, and last but not least complexity of the social problems intended to counter - portrayed e.g. by the absent of consensus on how to define these problems - organized crime being a case in point.

## **International efforts to suppress organized crime through domestic penal law – the system of Transnational Criminal Law.**

As noted by Boister, the system of Transnational Criminal Law is made up of suppression conventions that developed in response to the most pressing issues of the time. Taking as an example how a number of hijacking conventions were adopted in the late 1960's and early 1970's as a response to hijacking becoming a global problem.<sup>63</sup> By the end of the last century, Transnational Organized Crime was claimed to be on the rise and Kofi Annan, then the Secretary-General of the UN, stated in the year 2000 that transnational organized crime had become a global threat that had to be met with a global response.<sup>64</sup> The call for international response against organized crime continues. As a response to this, policy is being formed on a supranational basis, including but not limited to conventions, affecting domestic policy and legislations.<sup>65</sup>

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<sup>62</sup> J. H. H. Weiler, 'The Constitution of Europe' (CUP, New York 1999), at p 264 - 270.

<sup>63</sup> Boister, N, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law, 953, at p 957.

<sup>64</sup> Kofi A. Annan, Foreword of the United Nations Convention against Transnational Organized Crime, at p iii – iv <<http://www.unodc.org/>> Accessed 8 January 2011.

<sup>65</sup> For call for transnational response to organized crime see for example: United Nations, United Nations Office on Drugs and Crime, 'The globalization of crime' (United Nations Office on Drugs and Crime 2010), at p V and 36; Schloenhardt, Andreas, 'Palermo on the Pacific Rim' (United Nations Office on Drugs and Crime August 2009), at p 298 – 299; The United Nations Office on Drugs and Crime (UNODC), "Crime must have no home," says

## ‘Harmonization’ towards criminal justice response

The European Union responded to the call for a transnational integrated response to organized crime at a regional level in 1998 with its Joint Action, making it a criminal offence to participate in a criminal organization in its member states, requiring its member states to amend their domestic law accordingly.<sup>66</sup> The Joint Action also introduced a definition for a criminal organization.<sup>67</sup> The definition has met criticism from the scholarly community, e.g. for being vague and lacking the minimum clarity required in criminal law.<sup>68</sup>

The UN responded on the international level in 2000 with the United Nations Convention against Transnational Organized Crime, better known as the Palermo Convention.<sup>69</sup> The main goal for the Palermo Convention was to facilitate transnational cooperation in the subject field of organized crime. Nevertheless, the convention also introduced its own definition of an organized criminal group that has become a global standard.<sup>70</sup> That definition was, however, a political settlement between contradicting views of the signatory states of what constitutes organized crime, for the scope of the convention.<sup>71</sup> Because the scope of the convention was to facilitate transnational cooperation, the definition was not intended to tell the signatory states what they

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UNODC Chief ahead of Vienna Conference on transnational organized crime’, (UNODC press release 11 October 2012) <<http://www.unodc.org/unodc/en/press/allpress.html?ref=fp>> accessed 7 March 2013

Regarding policy being formed at supranational level see for example: The Stockholm Program [2010] OJ C115/1, at chapter 4, particularly subchapter 4.4. European Unions, Presidency of the Council of the European Union, ‘Draft Council Conclusions on the creation and implementation of a EU policy cycle for organised and serious international crime’ (The European Union, October 25, 2010)

<<http://register.consilium.europa.eu/pdf/en/10/st15/st15358.en10.pdf>> accessed on 27 November 2012.

<sup>66</sup> The Organized Crime Framework Decision [2008] OJ L300/42; Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime [1997] OJ L344/7.

<sup>67</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 27 - 28.

For the definition, see: ‘Joint Action of 21 December 1998’ (eur-lex.europa.eu December 29, 1998), art. 1.

<sup>68</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), 189, at p 28.

<sup>69</sup> UN General Assembly, ‘United Nations Convention against Transnational Organized Crime’ (United Nations November 15, 2000).

<sup>70</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 32.

<sup>71</sup> Ibid. Orlova, Alexandra V, and JW Moore, “‘Umbrellas’ or “‘building blocks’”? Defining international terrorism and transnational organized crime in international law ’ (2005) 27 *Houston Journal of International Law* (Magazine/Journal), 267, at p 285 - 287.

should regard to be organized crime and therefore was not drafted for such purpose.<sup>72</sup> The convention, again like the European Union's Joint Action, provides for two model offences that either or both must be established as criminal offences.<sup>73</sup> One has been called the conspiracy model, criminalizing conspiracy between two or more persons to commit a crime involving an organized criminal group, the other has been called the participation model, criminalizing participation in such group. The model offences have met criticism from the academic community primarily for being overly broad and under inclusive.<sup>74</sup> Neither of the model offences make any kind of transnational element a requirement in the description of the offence. Even if, article 3 of the Palermo Convention, titled Scope of the application clearly states that the scope of the Convention is where an offence is "transnational in nature".<sup>75</sup> Consequently, the influence of the Convention can be seen to exceed its scope by introducing model offences at the domestic level that are not limited to offences that are "transnational in nature". In fact, the organized crime offence in the Icelandic criminal code, art 175 a, was enacted to fulfill Iceland's obligations under the Palermo Convention.<sup>76</sup> The offence does not mention transnational elements as a requirement and the *travaux préparatoires* does not mention any legislative intent to limit the offence to activities that have transnational element.<sup>77</sup>

The European Union acted again in 2008 by adopting the Framework Decision. The 2008 Framework Decision had minor differences from the Palermo convention and its

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<sup>72</sup> Ibid

<sup>73</sup> United Nations Convention against Transnational Organized Crime (United Nations November 15, 2000), art. 5. Schloenhardt, Andreas, 'Transnational Organized Crime and International Criminal Law' in M Cherif Bassiouni (ed), *International Criminal Law, Volume I: Sources, Subjects, and Contents*, vol. 1 (3rd edn, Martinus Nijhoff Publishers / Brill Academic 2008), 939, at p 953. Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 33 - 34.

<sup>74</sup> Orlova, Alexandra V, and JW Moore, "Umbrellas" or "building blocks"? Defining international terrorism and transnational organized crime in international law ' (2005) 27 *Houston Journal of International Law* (Magazine/Journal), 267, at p 281 - 285. Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 32 - 35.

<sup>75</sup> United Nations Convention against Transnational Organized Crime (United Nations November 15, 2000), art. 3 para 1

<sup>76</sup> 'Excerpts from the General Penal Code, No. 19/1940, Articles 69 a-69 g, 100 a, 175 a and 264'. As changed by Act No. 149/2009. Accessed 8 May 2012. <<http://eng.innanrikisraduneyti.is/laws-and-regulations/english/penal-code-and-punishment/nr/27244>>

<sup>77</sup> Ibid; *Frumvarp til laga nr. 149/2009* (Bill of law no. 149/2009) from 8 October 2009 <<http://www.althingi.is/dba-bin/ferill.pl?ltg=138&mnr=16>> accessed 7 May 2012; *Lög um breyting á almennum hegningarlögum* (Law amending the General Penal Code) no 19 from 30 December 2009 <<http://www.althingi.is/altxt/stjt/2009.149.html>> accessed 7 May 2012

predecessor, the Joint Action from 1998.<sup>78</sup> The participatory model offence is changed so as not to include any more the reference to “other activities” than criminal, now only applying to criminal activities and listed non-criminal behaviours.<sup>79</sup> The non-criminal activities being listed as “provision of information or material means, the recruitment of new members and all forms of financing of its activities.”<sup>80</sup>

The decision also requires the member states to introduce a minimum sanction of two to five years for the offence of participation in a criminal organization.<sup>81</sup> Finally the decision requires, that committing an offence within the framework of a criminal organization may count as an aggravating circumstance in the member states, a requirement not either to be found in the other two international legal instruments.

These three international legal instruments all attempt to suppress organized crime by requiring their member states to criminalize specific activities under their domestic law.<sup>82</sup> Therefore they all meet the standards set by Boister for being part of Transnational Criminal Law – “. . . the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects.”<sup>83</sup> Whether the European Union legal instruments qualify as suppression conventions can however be contested.

However, the transnational efforts for harmonization of domestic legislations are not limited to ‘criminal law responses’<sup>84</sup> but are concerned more generally with ‘criminal justice

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<sup>78</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 41.

<sup>79</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 38.

<sup>80</sup> ‘Council Framework Decision 2008/977/JHA of 27 November 2008’ (Official Journal of the European Union December 30, 2008), art. 2 para. a.

<sup>81</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 38 - 39. ‘Council Framework Decision 2008/977/JHA of 27 November 2008’ (Official Journal of the European Union December 30, 2008), art. 3 para 1.

<sup>82</sup> UN General Assembly, ‘United Nations Convention Against Transnational Organized Crime’ (United Nations 2000), art 5. The Organized Crime Framework Decision [2008] OJ L300/42 art. 2. Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime [1997] OJ L344/7, art. 2.

<sup>83</sup> Boister, N, ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law*, 953, at p 955.

<sup>84</sup> For the purpose of this work, ‘criminal law responses’ and criminal justice responses’ will be used in accordance with the following definition: ‘Criminal law responses’ are only those responses that are based directly on the criminal law. ‘Criminal justice responses’, include criminal law responses, but additionally, include all the responses utilized by the criminal justice system for the purpose of enforcing the criminal law. These could be actions taken by authorities, such as detention and arrest for investigative purposes, search and seizure, etc. (potentially based on parts of the criminal procedural law, law about the judiciary, policing acts, etc.) Additionally,

responses'<sup>85</sup>. This work will differentiate between these two terms, 'criminal law responses' is considered to be responses that are based directly on the criminal law, while the 'criminal justice responses' additionally include responses for bringing about or enforce the criminal law although having a different legal basis. The international legal instruments require participating states – in addition to them introducing 'criminal law responses' – to introduce domestic legislations for furthering transnational cooperation in criminal matters; for facilitating detection, investigation and adjudication across borders, as well as to facilitate execution of sanctions.<sup>86</sup>

An important difference between the three above discussed legal instruments is that the Palermo convention promotes 'criminal justice responses' in general, while the two European Union instruments only promote 'criminal law responses'.<sup>87</sup> In fact, the cooperative provisions of the Palermo convention were said to have been the main concern for the negotiation of the convention, the model offences and definition of organize crime having been a secondary concern.<sup>88</sup> However, this difference should not be overstated, as the European Union goes even further in promoting 'criminal justice responses' other than 'criminal law responses', only the Union does so in a variety of different international legal instruments.<sup>89</sup>

International efforts continue to promote criminal justice responses for countering organized crime.<sup>90</sup> Within the European Union, policy is being formed and introduced both on

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responses intended to execute sanctions, by bringing about and manage the punishment that has been decided (potentially based on laws and regulations governing payment of fines, incarceration, disposal of criminally forfeited assets, etc.) These responses are generally based on legislations intended for the purpose of upholding the criminal law, to bring about punitive actions of the criminal law, and for the management of any punitive actions.

<sup>85</sup> Ibid.

<sup>86</sup> Orlova, Alexandra V, and JW Moore, "'Umbrellas" or "building blocks"? Defining international terrorism and transnational organized crime in international law' (2005) 27 Houston Journal of International Law, 267 at p 285.

<sup>87</sup> UN General Assembly, 'United Nations Convention Against Transnational Organized Crime' (United Nations 2000), art 11 – 31; The Organized Crime Framework Decision [2008] OJ L300/42. Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime [1997] OJ L344/7.

<sup>88</sup> Orlova, Alexandra V, and JW Moore, "'Umbrellas" or "building blocks"? Defining international terrorism and transnational organized crime in international law' (2005) 27 Houston Journal of International Law, 267 at p 285. Orlova cites Keith Morrill, the chief Canadian negotiator of the Palermo Convention.

<sup>89</sup> See for example: Council Decision establishing the European Police Office (Europol) [2009] OJ L121/37; Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office [1995] OJ C316/1.; The European Arrest Warrant [2002] OJ L190/1).

<sup>90</sup> United Nations, United Nations Office on Drugs and Crime, 'The globalization of crime' (United Nations Office on Drugs and Crime 2010), at p V and 36. Schloenhardt, Andreas, 'Palermo on the Pacific Rim' (United Nations

its transnational and supranational level, facilitating cooperation of member states in this field and influencing domestic policy and legislations.<sup>91</sup> The United Nations Office on Drugs and Crime assists member states to the Palermo Convention in implementing their domestic law to fulfill their international obligations under the convention.<sup>92</sup> The same United Nations body has published 'Digest of organized crime cases' which is a compilation of best practice and case law for countering organized crime in line with the convention.<sup>93</sup> Together the Palermo convention and the guidance of the United Nations Office on Drugs and Crime must be seen to influence domestic policy on how to counter organized crime globally, although probably not as influential on its member states as the European Union instruments.

The above coverage shows how international efforts are influencing domestic responses for countering organized crime, focusing on harmonization of criminal justice responses.

## **The Organized Crime discussion within the field of Transnational Criminal Law**

The main theme of the Transnational Criminal Law discussion regarding organized crime evolves about what could be called the definition crises of the organized crime term, as no agreed up on definition exists for the term. Leading to the absence of that fundamental definition in all the three international legal instruments for countering organized crime listed above. All of these three international legal instruments instead introduce criminal offences based on a marginally different definition for 'an organized criminal group' or 'a criminal organization'.<sup>94</sup>

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Office on Drugs and Crime August 2009), at p 298 - 299. "Crime must have no home," says UNODC Chief ahead of Vienna Conference on transnational organized crime', UNODC press release 11 October 2012 <<http://www.unodc.org/unodc/en/press/allpress.html?ref=fp>> accessed 7 March 2013.

<sup>91</sup> The Stockholm Program [2010] OJ C115/1 at chapter 4, particularly subchapter 4.4. European Unions, Presidency of the Council of the European Union, 'Draft Council Conclusions on the creation and implementation of a EU policy cycle for organised and serious international crime' (The European Union, October 25, 2010) <<http://register.consilium.europa.eu/pdf/en/10/st15/st15358.en10.pdf>> accessed on 27 November 2012.

<sup>92</sup> United Nations, Economic and Social Council (ECOSOC), 'Support for the development and implementation of an integrated approach to programme development at the United Nations Office on Drugs and Crime' (United Nations, July 28, 2011); See about the United Nations Office on Drugs and Crime: The United Nations Office on Drugs and Crime, office website <[www.unodc.org](http://www.unodc.org)> accessed 27 November 2012.

<sup>93</sup> 'Digest of organized crime cases' (United Nations Office on Drugs and Crime 16 October 2012).

<sup>94</sup> Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010), at p 26 - 41. UN General Assembly, 'United Nations Convention Against Transnational Organized Crime' (United Nations

Political differences between nation states, as to how organized crime should be defined, seem to have thwarted the creation of a global definition. Part of the political difference having to do with how some countries feared that a too broad definition would make it possible to class cases of terrorism as organized crime, while other countries preferred that exact possibility.<sup>95</sup> However, as stated above, the absent of definition seems to some extent to be caused by the fact that the contracting states did not intend to create a definition that would tell the signatory states what they should regard to be organized crime – but only to frame the scope of their transnational cooperation in the field.<sup>96</sup>

Academics have no more than the politicians been able to agree upon a definition for the phenomenon.<sup>97</sup> Some scholars have argued that the appropriate way to define organized crime would be to base a definition on the distinctive features of organized crime.<sup>98</sup> However, no agreement has been reached as to what those distinctive features are.<sup>99</sup> Other scholars have claimed: “. . . we might define organized crime as being that crime that is committed by criminal organizations.”<sup>100</sup> Yet others seem to regard it favourable to consider the method of operation (*modus operandi*) as the basis for describing the characteristics of organized crime.<sup>101</sup> Where

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2004), art 5. The Organized Crime Framework Decision [2008] OJ L300/42 art. 2. Council of the European Union ‘Joint action of 21 December 1998, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union’, 98/733/JHA (Official Journal of the European Union, 29 December 1998) art. 2.

<sup>95</sup> Orlova, Alexandra V, and JW Moore, “Umbrellas” or “building blocks”? Defining international terrorism and transnational organized crime in international law ’ (2005) 27 Houston Journal of International Law (Magazine/Journal), 267 at p 285 - 287.

<sup>96</sup> Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010), at p 32. Orlova, Alexandra V, and JW Moore, “Umbrellas” or “building blocks”? Defining international terrorism and transnational organized crime in international law ’ (2005) 27 Houston Journal of International Law (Magazine/Journal), 267, at p 285 - 287.

<sup>97</sup> Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010), p 42.

<sup>98</sup> Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010) p 42.

Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 298

<sup>99</sup> Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010) p 42. Citing: Fijnaut, C, (2004) ‘Police co-operation and the area of freedom, security and justice’, in Walker N (ed) *Europe’s area of freedom, security and justice* (Oxford University Press, 2004), 241, at p 267–270; Fijnaut, C, ‘Controlling organised crime and terrorism in the European Union’ in Bassiouni, MC, Militello, V and Satzger, H (eds) *European cooperation in penal matters: issues and perspectives* (Cedam 2008), 243 at p 244–247; Mitsilegas, V, *EU criminal law* (Hart Publishing 2009), p 93.

<sup>100</sup> Finckenauer, James O, ‘Problem of Definition: What is Organized Crime?’ (2005) 8 Trends in Organized Crime, 63, at p 76.

<sup>101</sup> Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010), at p 82 - 84

legal activity or aims can fall within the scope of organized crime legislations where the intimidating power of a criminal association is used to bring about submission.

Calderoni has claimed that although there is no general agreement on a definition for organized crime, several studies have indicated four common elements:

- Continuity. The group must have a stable structure suited to the continuous and indefinite commission of crimes, independently of its membership (Finckenauer 2005, 66; Bäckman 1998, 25; Hagan 2006, 135).
- Violence. The group exploits its force to use or to threaten to use violence or intimidation. This may be addressed to other criminal groups, minor criminals, legal/illegal competitors and victims (Finckenauer 2005, 66; Bäckman 1998, 26; von Lampe et al. 2006, 36; Spinellis 1997, 813).
- Enterprise. The group's main goals are profit and power. These are usually pursued through the production and/or exchange of illegal goods and/or services in illegal markets (Finckenauer 2005, 66–67; Hagan 2006, 134; Spinellis 1997, 813).
- Immunity. The group can corrupt or exert influence on other subjects (politicians, media, judicial authorities, administrators, enterprises) in order to shield its activities from any form of sanctions (Finckenauer 2005, 67; Bäckman 1998, 27; Hagan 2006, 135; Spinellis 1997, 813).<sup>102</sup>

However, he claims that none of the definitions provided in the international legal instruments for countering organized crime clearly reflect any of these elements. Orlova and Moore claim that it would have been better that the state parties would have omitted the definition under article 2 of the Palermo convention “rather than create a definition that is arguably both overly broad and under-inclusive.”<sup>103</sup>

Existing definitions have been criticized for overbreadth and vagueness, effectively allowing authorities to use organized crime legislations against other groups that are not

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<sup>102</sup> Ibid, at p 42.

<sup>103</sup> Orlova, Alexandra V, and JW Moore, “"Umbrellas" or “building blocks”? Defining international terrorism and transnational organized crime in international law ’ (2005) 27 *Houston Journal of International Law* (Magazine/Journal), 267 at p 287.



favoured by the government, but for other reasons than organized criminality.<sup>104</sup> As mentioned above this was one of the issues thwarting the negotiations about definitions for the Palermo convention.<sup>105</sup>

Additionally, it has been argued that heavier punishments and increased law enforcement powers were justified by elevated harm and danger to the society caused by organized crime.<sup>106</sup> This justification has, however, been argued to fail, on account of vagueness and overbreadth of definitions, causing other groups of people than criminal organizations and other activities than organized crime to be subject to organized crime legislations.<sup>107</sup>

On this same account definitions of organized crime have been said to violate the proportionality principle. By way of providing for increased punishment for organized crime activities, without providing definitions that secure that these increased punishments apply only for organized crime activities.<sup>108</sup> Consequently, failing to recognize how proportionality “. . . must always be measured by weighing the freedom of each individual against his/her own criminal activity”.<sup>109</sup>

Also, this overbreadth and vagueness of the definitions of organized crime, or lack of such definition, has been criticized for violating fundamental principles of the criminal law.<sup>110</sup> Estela Baker has pointed out how the definition problem poses a treat to the principle of clarity in criminal law, noting that “[I]t is a basic requirement of the rule of law that criminal law should

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<sup>104</sup> Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 296; Citing: Koenig, Doreen Marguerite, ‘The Criminal Justice System Facing the Challenge of Organized Crime’ (1998) 44 Wayne Law Review, 1351, at 1377.

<sup>105</sup> Orlova, Alexandra V, and Moore, JW, “‘Umbrellas’ or ‘building blocks’”? Defining international terrorism and transnational organized crime in international law’ (2005) 27 Houston Journal of International Law (Magazine/Journal), 267 at p 285 - 286.

<sup>106</sup> Baker, Estella, ‘The legal regulation of transnational organised crime: Opportunities and limitations’ in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime : Perspectives on Global Security* (Routledge 2003), 183 at p 186 - 188. Symeonidou-Kastanidou, Elisabeth, ‘Towards a New Definition of Organised Crime in the European Union’ (2007) 15 European Journal of Crime, Criminal Law and Criminal Justice, 83 at p 89 - 92.

<sup>107</sup> Symeonidou-Kastanidou, Elisabeth, ‘Towards a New Definition of Organised Crime in the European Union’ (2007) 15 European Journal of Crime, Criminal Law and Criminal Justice, 83 at p 89 - 92.

<sup>108</sup> Ibid at p 93 - 95

<sup>109</sup> Ibid at p 95.

<sup>110</sup> Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 37 - 38 and 288 - 289. Calderoni, Francesco, ‘Conclusions and Implications’ in *Organized crime legislation in the European Union* (Springer Verlag 2010) p 167 - 170.

be sufficiently clear for individuals to be able to discriminate between those acts that will infringe the norms that it lays down and those which will not”.<sup>111</sup>

Another important theme of the discussion about organized crime legislations has been the extension of criminal liability these laws generally provide for. As Schloenhardt explains, organized crime offences generally extend criminal liability beyond traditional boundaries of criminal liability.<sup>112</sup> “Liability arises on the basis of loose associations and intentions, rather than on the basis of proven physical results or harmful conduct.”<sup>113</sup> A person can become responsible for actions taken before the preparation and even the planning of the offence in question.<sup>114</sup> Schloenhardt cites Frank Verbruggen that the classic theory has been:

“... that states should not intervene in human relations with a blunt instrument like criminal law unless damage has been done to a specific “legally proscribed interest”, “a common good” like property, sexual integrity or life and limb. [...] Instead, criminal law becomes a tool to prevent the damage from ever happening, by making endangerment the threshold for intervention and sanctioning.”<sup>115</sup>

Towards the same end Schloenhardt cites Mullins that:

“[t]his 'remoteness of social danger' can undermine the justification for criminal liability to apply.[...] In a properly minimalist system of criminal law, conduct that is too remote from social harm should not be criminalised”<sup>116</sup>

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<sup>111</sup> Baker, Estella, ‘The legal regulation of transnational organised crime: Opportunities and limitations’ in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime : Perspectives on Global Security* (Routledge 2003), 183 at p 189. Baker cites: Ashworth, A.J., *Principles of Criminal Law*, 3rd edn. (Oxford University press 1999) 76 - 78. See also on the Rule of Law: Raz, Joseph, ‘The Rule of Law and its Virtue’ in *The authority of law: Essays on law and Morality* (Oxford Scholarship Online 2012).

<sup>112</sup> Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 286 - 291

<sup>113</sup> Ibid, p 287.

<sup>114</sup> Ibid, p 287.

<sup>115</sup> Verbruggen, Frank, ‘On Containing Organised Crime Using “Container Offences”’, in Hans-Jörg Albrecht & Cyrille Fijnaut (eds), *The Containment of Transnational Organised Crime: Comments on the UN Convention of December 2000*, Freiburg: Edition Iuscrim, 2002, 113 at p 130. As cited in Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 287.

<sup>116</sup> Mullins T, ‘Broader Liability for Gang Accomplices: Participating in a Criminal Gang’ (1996 - 1999) *Auckland University Law Review* 8, p 832 at p 852. As cited in Schloenhardt, A, ‘Mafias and Motorbikes: New Organised Crime Offences in Australia’ (2008) 19 *Current Issues Crim Just*, 259 at p 278.

Schloenhardt remarks that concerns have been raised over the compatibility of this broadening of criminal liability with basic ideas of the role of the criminal law and traditional principle of criminal law.<sup>117</sup> He cites Edward Wise for concerns over compatibility with:

“... traditional principles of criminal law which are supposed to require focusing attention on the concrete specific act of a specific individual at a specific moment in time and on that individual’s own personal guilt, not on that of his associates.”<sup>118</sup>

This concern over creating guilt by association has been yet another theme of the discussion about organized crime legislations. David Freedman notes that many countries have been introducing new forms of individual criminal liability under organized crime legislations.<sup>119</sup> Where individual conduct is criminalized but the activity that constitutes the substantive offence is a group activity. This Freedman sees as a difficult move:

“Our criminal law has always professed to be concerned with the acts or omissions of a discrete individual, with doctrine crafted to link the requisite fault requirements of a given offence with the moral and social considerations that rationalize stigma and punishment - in respect of that individual and for that offence alone. With targeted organized crime laws we move [...] closer, some might say, to guilt by association.”<sup>120</sup>

Additionally, concerns have been expressed over the compatibility of criminalization of association with the right to freedom of association as a fundamental Human Right.<sup>121</sup>

Concerns have also been raised over what should be a punishable level of involvement with a group.<sup>122</sup>

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<sup>117</sup> Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), at p 287 and 36 - 37.

<sup>118</sup> Wise, Edward M, ‘RICO and its Analogues: Some Comparative Considerations’ (2000) 27 Syracuse J. Int'l & Com., 303, at p 321. As cited in: Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), 38.

<sup>119</sup> Freedman, David, ‘The New Law of Criminal Organizations in Canada’ (2006) 85 The Canadian Bar Review, 171 at p 172.

<sup>120</sup> Freedman, David, ‘The New Law of Criminal Organizations in Canada’ (2006) 85 The Canadian Bar Review, 171 at p 172 - 173. Edward Wise raises similar concerns, see: Wise, Edward M, ‘RICO and its Analogues: Some Comparative Considerations’ (2000) 27 Syracuse J. Int'l & Com., 303 at p 321.

<sup>121</sup> Wise, Edward M, ‘RICO and its Analogues: Some Comparative Considerations’ (2000) 27 Syracuse J. Int'l & Com., 303 at p 321. Kent Roach, ‘Panicking over Criminal Organizations: We Don’t Need Another Offence’ (2000) 44(1) Criminal Law Quarterly 1 at 2. As cited in Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 38.

In fact, scholars have claimed that the criminal law is ill suited to deal with collective behaviour such as organized crime.<sup>123</sup> Estella Baker claims that:

“The criminal law copes badly when harm amounting to a criminal act takes place as a result of the collective actions or omissions of a group of individuals or of an organization, especially where the blame for their occurrence is widely diffused among a body of actors.”<sup>124</sup>

Consequently, it is no small task to draft criminal law provisions capable of effectively counter the perceived criminal activity, while still being compatible with fundamental principles of the criminal law, principles that have developed in a system that traditionally was mainly concerned with individual behaviour.

Finally, the discussion about organized crime in the field of Transnational Criminal Law has to some extent evolved around the different models of organized crime offences in the world. Schloenhardt has claimed different legislative approaches have created four different models of organized crime offences and listed them as:

“1. The conspiracy model, found in the CTOC<sup>125</sup> and in all Australian jurisdictions, as well as Singapore, Malaysia, Brunei Darussalam, and Papua New Guinea;

2. The participation model stipulated by the CTOC<sup>126</sup>, and also adopted in Canada, New Zealand, New South Wales (Australia), China, Macau, Chinese Taipei (Taiwan), and in Australian federal criminal law;

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<sup>122</sup> Blakesley, ‘The Criminal Justice System Facing the Challenge of Organized Crime’, at p 79. As cited in Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 37.

<sup>123</sup> Baker, Estella, ‘The legal regulation of transnational organised crime: Opportunities and limitations’ in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge 2003), 183 at p 185. Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 25. Schloenhardt, Andreas, ‘Fighting Organized Crime in the Asia Pacific Region: New Weapons, Lost War’ (2012) 2 *Asian Journal of International Law*, 137 at p 158. Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 36 - 46.

<sup>124</sup> Baker, Estella, ‘The legal regulation of transnational organised crime: Opportunities and limitations’ in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge 2003), 183 at p 185.

<sup>125</sup> ‘United Nations Convention Against Transnational Organized Crime’ (United Nations 2000). CTOC is an abbreviation that Schloenhardt uses for this UN convention.

<sup>126</sup> Ibid

3. The enterprise model based on the US RICO Act, which is also used in many US states, and the Philippines; and
4. The labelling/registration model of Hong Kong, Singapore, Malaysia, Japan, New South Wales, Queensland, Northern Territory, and South Australia.”<sup>127</sup>

Schloenhardt remarks that “. . . the organised crime laws are local responses to local problems.”<sup>128</sup> Claiming the criminal law provisions are tailored to suit a particular organized crime problem perceived to demand a response at a given time in a particular society.

There are however those that claim that specific organized crime offences are not needed, like Kent Roach. Roach has claimed, speaking in the Canadian domestic context, that new offences are not needed and will in fact not ‘get the job done’.<sup>129</sup> Some, like Dorean Koenig, even consider these offences to have become a problem themselves by threatening to change the criminal justice system “. . . by greatly increasing the reach of the criminal law and enhancing sentences, while lessening the mens rea requirements.”<sup>130</sup>

Schloenhardt has taken similar stance as Orlova and Moor, in their article on international response to organized crime and terrorism in 2005, that specific offences are more feasible than general ‘catch-all’ offences.<sup>131</sup> Orlova and Moor recommended a number of conventions with clear definitions and clearly defined and limited offences, which would create a ‘building block’ of conventions for countering organized crime. Rather than creating vague and ill defined ‘umbrella offences’, like they considered the Palermo convention to have done. Similarly Schloenhardt has recommended specific offences for criminalizing selected key functions of criminal organizations, avoiding broad and uncertain terms, and requiring proof of specific

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<sup>127</sup> Schloenhardt, Andreas, ‘Fighting Organized Crime in the Asia Pacific Region: New Weapons, Lost War’ (2012) 2 Asian Journal of International Law, 137 at p 141. CTOC refers to: UN General Assembly, ‘United Nations Convention Against Transnational Organized Crime’ (United Nations 2004).

<sup>128</sup> Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 285.

<sup>129</sup> Roach, Kent, ‘Panicking over Criminal Organizations: We Don’t Need Another Offence’ (2000) 44 The Criminal Law Quarterly, 1 at p 3.

<sup>130</sup> Koenig, Dorean Marguerite, ‘The Criminal Justice System Facing the Challenge of Organized Crime’ (1998) 44 Wayne Law Review, 1351 at p 1377. As cited in: Schloenhardt, Andreas, ‘Fighting Organized Crime in the Asia Pacific Region: New Weapons, Lost War’ (2012) 2 Asian Journal of International Law, 137 at p 165.

<sup>131</sup> Orlova, Alexandra V, and JW Moore, “‘Umbrellas’ or ‘building blocks’? Defining international terrorism and transnational organized crime in international law ’ (2005) 27 Houston Journal of International Law (Magazine/Journal), 267 at p 307 - 309.

mental element.<sup>132</sup> He claims that this way the legislations can avoid the criticism of vagueness and overbreadth. Furthermore, he argues this approach to impose penalty that is proportionate to the intentions and knowledge of the specific individuals accused, based on their individual blameworthiness.

The four models listed by Schloenhardt above, all fall in the category of what here is called 'catch-all' or 'umbrella offences', including the two model offences of all the three main international legal instruments intended to counter organized crime.

Latest developments suggest that the organized crime term is now being complemented, or even giving way for the term, 'serious crime'. Nicholas Dorn reflects up on this switch from the organized crime term towards the serious crime term in his article 'The end of organised crime in the European Union'.<sup>133</sup> Dorn claims that the presumption that a crime being organized equals that it is serious, and visa versa, is giving way for more harm based assessment.<sup>134</sup> Claiming that the shift towards the 'serious crime' term will allow policing prioritization and cooperation to be guided by assessment of social harm as opposed to structural assessment such as level of organization. However, the shift towards the 'serious crime' term seems not to have brought about the emphasize on assessment of social harm that Dorn predicted in 2008.

Judging from the use of the term 'serious crime' within the European Union, the term seems to be introduced as a concept that has wider scope than 'organized crime', organized crime being only but one form of 'serious crime'.<sup>135</sup> One evidence of this is how the term is utilized to

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<sup>132</sup> Schloenhardt, Andreas, 'Fighting Organized Crime in the Asia Pacific Region: New Weapons, Lost War' (2012) 2 Asian Journal of International Law, 137 at p 160 - 162. Schloenhardt, Andreas, 'Palermo on the Pacific Rim' (United Nations Office on Drugs and Crime August 2009), p 289- 291. For others supportive of this approach, see: Moon, Michael A, 'Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime' [1999] Queen's Law Journal, 451 at p 499. As cited in: Schloenhardt, Andreas, 'Palermo on the Pacific Rim' (United Nations Office on Drugs and Crime August 2009), p 291

<sup>133</sup> Dorn, Nicholas, 'The end of organised crime in the European Union' (2008) 51 American Journal of Criminal Justice, 283.

<sup>134</sup> Dorn, Nicholas, 'The end of organised crime in the European Union' (2008) 51 American Journal of Criminal Justice, 283, at p 285 – 286.

<sup>135</sup> Council Decision establishing the European Police Office (Europol) [2009] OJ L121/37, art. 3; Council of the European Union, General Secretariat, 'Serious and Organised Crime Threat Assessment (SOCTA) - Methodology', July 4, 2012, at p 8 – 9; The Stockholm Program [2010] OJ C115/1, chapters 3.3.1 and 4.4; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1, art 83.

describe the objective of the European Police Office (EUROPOL) with the expressed intent to “ . . . ensure that Europol can assist the competent authorities of the Member States in combating specific forms of serious crime, without the current limitation that there must be factual indications that an organised criminal structure is involved.”<sup>136</sup> Still, this study was unable to find any definition for the term ‘serious crime’ in any of the many documents of the European Union that use the term, in fact there is little discussion to be found about the term’s definition.<sup>137</sup> Some of the documents present a list of criminal activities that are considered ‘serious crime’, however the activities listed as constituting ‘serious crime’ differ between the lists.

It should, furthermore, be noted that the term ‘serious crime’ was part of the United Nations definition of an ‘organized criminal group’ in the Palermo convention. There ‘serious crime’ is defined as a crime, punishable by at least four years maximum penalty.<sup>138</sup> This is problematic, as the criminal activity considered to be ‘serious crime’ can consequently vary between jurisdictions and domestic authorities can choose to include or exclude certain activities from being considered ‘serious crime’ simply by changing the maximum penalty under domestic law. Also, the United Nations definition of ‘serious crime’ does not rely on assessment of harm. The above listing of the European Union of activities considered to be ‘serious crime’, suggests that to the European Union ‘serious crime’ is what the Union says it is.

The Organized Crime discussion within the field of Transnational Criminal Law shows there to be practical and theoretical difficulties with the attempts made to counter organized crime by way of criminalizing organized crime specifically. To large extent caused by the absence of consensus of what is the social problem intended to counter and what actions

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<sup>136</sup> Council Decision establishing the European Police Office (Europol) [2009] OJ L121/37, p 37 para 8. See art. 3 for the objective of EUROPOL.

<sup>137</sup> Council Decision establishing the European Police Office (Europol) [2009] OJ L121/37, art. 3; Council of the European Union, General Secretariat, ‘Serious and Organised Crime Threat Assessment (SOCTA) - Methodology’, July 4, 2012, at p 8 – 9; The Stockholm Program [2010] OJ C115/1, chapters 3.3.1 and 4.4; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1, art 83.

<sup>138</sup> UN General Assembly, ‘United Nations Convention Against Transnational Organized Crime’ (United Nations 2004), art. 2 para b.

constitute that said social problem. This definitional issue seems not easily solved, least of all by casting the net even wider and less restrictively with the introduction of the new term 'serious crime', term even less defined than 'organized crime'.

## **Pluralism as an alternative to 'harmonization'**

Transnational and international efforts to influence and harmonize domestic efforts for countering organized crime should be seen as a form of global governance. Transnational Criminal Law according to Boister is: "the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects."<sup>139</sup> By definition it is the global governance of domestic legislation within its limited subject field, indirectly governing activities of individuals. Therefore, Transnational Criminal Law needs to be examined in the context of academic discussions about global governance. That discussion has raised a variety of practical and theoretical issues facing global governance. Academic discussion on constitutional pluralism show there to be real problems both theoretically and practically with drafting a normative order at the global or even regional level.<sup>140</sup>

The above discussion shows international efforts for countering organized crime to focus largely on the constitutionalization of the field of law governing transnational efforts for the countering of organized crime, by creation of universal norms and harmonization of domestic legislations towards those universal norms. Therefore, when considered in the context of academic discussion on legal pluralism, these international efforts for countering organized crime seem to raise both theoretical and practical issues. Additionally, Peer Zumbansen's writings claim that constitutional pluralism raises important doubt of current approach, of harmonization towards model offences, ability to yield real harmonization.<sup>141</sup> Subsequently,

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<sup>139</sup> Boister, N, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law*, 953, at p 955.

<sup>140</sup> Walker, Neil, 'Taking Constitutionalism Beyond the State' (2008) 56 *Political Studies*, at p 533 - 541. Krisch, Nico, 'The Case for Pluralism in Postnational Law' [2009] *Law Society and Economy Working Papers*, at p 7 - 9 and 40 - 45.

<sup>141</sup> Zumbansen, Peer, 'Transnational comparisons: theory and practice of comparative law as a critique of global governance' in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge



international efforts for the countering of organized crime need to be considered in the light of pluralist legal thinking in the field of global governance and transnational comparative law. After all, these international efforts are part of globalization of governance and transnational comparative law is the tool both for assessing existing domestic effort for the selection of best practices, and for the drafting of international policies and legal instruments that will truly bring about the intended results.

Constitutionalism has become the predominant form of governance and legal ordering, but has come under increasing criticism; see for example James Tully's work titled *Strange Multiplicity*.<sup>142</sup> His criticism is primarily focused on the inability of constitutional schemes to “. . . cope with serious social and cultural diversity because of its strong link to ideas of impartiality and uniformity.”<sup>143</sup> Tully's criticism was primarily concerned with nation states, but his arguments have been seen to be even stronger at the subnational level, where diversity can be expected to be even greater than in any nation state.<sup>144</sup>

Pluralism has been suggested as an alternative to constitutionalism as a normative order for global governance and lately global administrative law. Neil Walker explained that unlike the constitutional ideas that saw the world order as “. . . one of completeness and hierarchy within each constitutional unit and limited interaction between units, . . .”<sup>145</sup> the pluralism sees “. . . the incompleteness of the discrete units and an increased emphasis on the heterarchical relations between the units.”<sup>146</sup>

Similarly Nico Krisch has described constitutional pluralism in the following way:

“While constitutionalists, drawing on domestic inspirations, generally strive for a common frame to define both the substantive principles of the overall order and the relations between its different parts, pluralists prefer to see the postnational realm as characterised by heterarchy, by an interaction of

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University Press 2012), 186. Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 *Global Constitutionalism*, 16.

<sup>142</sup> Tully, James, *Strange multiplicity* (Cambridge Univ Pr 1995).

<sup>143</sup> Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] *Law Society and Economy Working Papers*, at p 8. Referring to: Tully, James, *Strange multiplicity* (Cambridge Univ Pr 1995), chapters 2 and 3.

<sup>144</sup> Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] *Law Society and Economy Working Papers*, at p 9, 11 and 13.

<sup>145</sup> Walker, Neil, ‘Rosenfeld's plural constitutionalism’ (2010) 8 *Int. Jnl. of Constitutional Law*, 677, at p 678.

<sup>146</sup> *Ibid*

different sub-orders that is not subject to common legal rules but takes a more open, political form.”<sup>147</sup>

It is argued here that the international efforts in the field of Transnational Criminal Law strive to constitutionalize the field, by creation of common frame and hierarchical order of norms both at the international and the domestic level.

Krisch has in his writings on global administrative law endorsed Tully’s claim of the difficulties that face constitutionalist models, claiming constitutional pluralism as a better equipped form of global governance to deal with diversity of loyalty and interests when confronted with the fact of this pluralist legal universe.<sup>148</sup> Claiming constitutional pluralism to have: “. . . significant strengths in providing adaptability, space for contestation, and a possibility of steering between conflicting supremacy claims of different polity levels.”<sup>149</sup>

Michel Rosenfeld had previously claimed that pluralism is the right approach for our “pluralist-in-fact universe”<sup>150</sup>, where he sees power to be spread among the national-, transnational- and supranational level.<sup>151</sup> He argues “that it is possible to reconcile legal and ideological pluralism by abandoning hierarchy and countenancing inconsistencies falling short of incompatibilities in a highly layered and segmented legal universe.”<sup>152</sup> For this Rosenfeld has suggested some existing constitutional tools, most of which contribute to the layering of communities, administration, conflict resolution and “self”. He seems to favour conflict resolution at the lowest possible level involving only those relevantly affected.<sup>153</sup>

Krisch notes that the pluralism approach will not be free from difficulties, but after analyses and comparison of the normative appeals and difficulties of different forms of constitutionalism on the one hand and different forms of constitutional pluralism on the other, he

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<sup>147</sup> Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] Law Society and Economy Working Papers, at p 2.

<sup>148</sup> Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] Law Society and Economy Working Papers, at p 8 and 35.

<sup>149</sup> Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] Law Society and Economy Working Papers, at p 2.

<sup>151</sup> Rosenfeld, Michel, ‘Rethinking constitutional ordering in an era of legal and ideological pluralism’ (2008) 6 International Journal of Constitutional Law, 415, at p 442.

<sup>152</sup> Rosenfeld, Michel, ‘Rethinking constitutional ordering in an era of legal and ideological pluralism’ (2008) 6 International Journal of Constitutional Law, 415, at p 415.

<sup>153</sup> Rosenfeld, Michel, ‘Rethinking constitutional ordering in an era of legal and ideological pluralism’ (2008) 6 International Journal of Constitutional Law, 415, at p 437 - 452.

finds in favour of the pluralist approach.<sup>154</sup> “In the divided, highly contested space of the postnational, ideal solutions are elusive – and pluralism may be the best option we have.”<sup>155</sup>

The above discussion claims that we live in a “pluralist-in-fact universe”<sup>156</sup> where every person finds himself subject to varieties of often overlapping norms and subject to power of different levels of governance, domestic, trans- and supranational. This description seems to reflect well the findings of both Calderoni and Schloenhardt in the field of Transnational Criminal Law showing the diversity of organized crime legislation and the influence that international legal instrument have had on these legislations.<sup>157</sup>

Academic discussion on constitutional pluralism show there to be real problems both theoretically and practically with drafting a normative order at the global or even regional level.<sup>158</sup> For example, even the relatively homogeneous region of the European Union failed, at least for now, in its attempt to create a constitution for the Union.<sup>159</sup> The discussion shows the difficulty in drafting a system capable of creating norms for such socially and culturally diverse polity, as is the ‘global community’. Whereas scholars like Rosenfeld suggest creating layering in the attempt to solve conflict at the lowest possible level, where conflicting interests and norms are likely to be fewer in number, involving only those relevantly affected.<sup>160</sup>

Surprisingly, in the light of the above detailed discussion, the international efforts in the field of Transnational Criminal Law seems nevertheless to emphasize the creation of a common

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<sup>154</sup> Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] Law Society and Economy Working Papers.

<sup>155</sup> Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] Law Society and Economy Working Papers, at p 45.

<sup>156</sup> Rosenfeld, Michel, ‘Rethinking constitutional ordering in an era of legal and ideological pluralism’ (2008) 6 International Journal of Constitutional Law, 415, at p 442.

<sup>157</sup> Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010). Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009).

<sup>158</sup> Walker, Neil, ‘Taking Constitutionalism Beyond the State’ (2008) 56 Political Studies, at p 533 - 541. Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] Law Society and Economy Working Papers, at p 7 - 9 and 40 - 45.

<sup>159</sup> Walker, Neil, ‘Not the European Constitution’ (2008) 15 Maastricht journal of European and comparative law, 135. Walker, Neil, ‘Europe's constitutional momentum and the search for polity legitimacy’ (2005) 3 International Journal of Constitutional Law, 211. See also on European integration: Weiler, J H H, *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration* (Cambridge University Press 1999), 364.

<sup>160</sup> Rosenfeld, Michel, ‘Rethinking constitutional ordering in an era of legal and ideological pluralism’ (2008) 6 International Journal of Constitutional Law, 415, at p 437 - 452

framework to harmonize domestic criminal law as crucial for international efforts intended to suppress organized crime. Furthermore, the emphasize of the academic discussion seems to be on the existing norms and constitutionalizing efforts, with the aim of creating universally applicable definitions and norms, capable of countering the variety of different organized crime problems in the world. While the pluralist arguments show the feasibility of heterarchical relationship and cooperation mechanism, to further common goals and policies, based on best knowledge and experience.

Furthermore, Peer Zumbansen's writings on constitutional pluralism suggest that the harmonization of norms in the field of Transnational Criminal Law is not on its own likely to yield a real harmonization of responses and effects at the domestic level. Zumbansen has emphasized functionalism, interdisciplinary approach and appropriate context as essential for today's comparative legal studies.<sup>161</sup>

Zumbansen has claimed that "[a]t the heart of comparing legal cultures today lies an unavoidably interdisciplinary study of legal and non-legal norms, routines and social practices".<sup>162</sup> Zumbansen suggests "interdisciplinary understanding of functionalist comparisons"<sup>163</sup>, which he claims cannot be fruitfully realized without drawing from insights of other disciplines.<sup>164</sup> Zumbansen argues that comparative legal studies in today's pluralistic legal reality have to be conducted in the appropriate legal-, historical-, economic-, political-, social- and ideological-context both locally and internationally.<sup>165</sup>

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<sup>161</sup> Zumbansen, Peer, 'Transnational comparisons: theory and practice of comparative law as a critique of global governance' in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186.

Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 *Global Constitutionalism*, 16.

<sup>162</sup> Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 *Global Constitutionalism*, 16, at p 51.

<sup>163</sup> Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 *Global Constitutionalism*, 16, at p 51.

<sup>164</sup> Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 *Global Constitutionalism*, 16, at p 50 – 51. Zumbansen, Peer, 'Transnational comparisons: theory and practice of comparative law as a critique of global governance' in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186, at p 204 and 206.

<sup>165</sup> Zumbansen, Peer, 'Transnational comparisons: theory and practice of comparative law as a critique of global governance' in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186, at p 204 and 206

Zumbansen's writings do not build a good case for harmonization of norms, arguing that the same legal text might have different effect or be implemented differently in countries that differ in their legal-, historical-, economic-, political-, social- and ideological-context. Suggesting that the harmonization of domestic organized crime legislations does not necessarily yield harmonization of responses intended to counter organized crime, let alone bring any assurance for having the same effects in different context of different societies.

Additionally, Zumbansen's writings suggest that international efforts intended to share practices and experiences between nation states, must be based on studies of existing practices and experiences in both nation states conducted with "interdisciplinary understanding of functionalist comparisons"<sup>166</sup>, in the appropriate context of legal and non-legal norms, routines and social practices.<sup>167</sup> Suggesting that such extensive understanding of existing practices and experiences in both nation states is fundamental for the apprehension of sound knowledge capable of making such information sharing truly beneficial.

Zumbansen's writings seem also relevant to any comparative legal studies of Transnational Criminal Law in general and in particularly subjects as heavily influenced by international efforts as organized crime. The findings of both Calderoni and Schloenhardt show a wide variety of domestic legislations intended to counter organized crime.<sup>168</sup> Schloenhardt has noted that ". . . the organised crime laws are local responses to local problems."<sup>169</sup> Furthermore, he gives a detailed account of relevant political, historical, social and legal context of these local responses.<sup>170</sup> Subsequently, academic research in the field seems to support Zumbansen's

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Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 Global Constitutionalism, 16, at p 50 - 51.

<sup>166</sup> Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 Global Constitutionalism, 16, at p 51.

<sup>167</sup> Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 Global Constitutionalism, 16, at p 50 – 51. Zumbansen, Peer, 'Transnational comparisons: theory and practice of comparative law as a critique of global governance' in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186, at p 204 and 206.

<sup>168</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 118 - 121; Schloenhardt, Andreas, 'Palermo on the Pacific Rim' (United Nations Office on Drugs and Crime August 2009).

<sup>169</sup> Schloenhardt, Andreas, 'Palermo on the Pacific Rim' (United Nations Office on Drugs and Crime August 2009), p 285.

<sup>170</sup> Schloenhardt, Andreas, 'Palermo on the Pacific Rim' (United Nations Office on Drugs and Crime August 2009)

argument for need for “interdisciplinary understanding of functionalist comparisons”<sup>171</sup> in appropriate context of legal and non-legal norms, routines and social practices.<sup>172</sup>

Such interdisciplinary understanding of functionalist comparison in appropriate context, seems to require a study of organized crime legislations in different jurisdictions to take into consideration all responses utilized for this purpose, not only criminal justice responses. If for nothing else, for the sake of how availability of additional responses can be expected to affect the implementation of criminal justice responses, if only for the fact that the availability of different measures for countering organized crime might affect the approaches chosen by the practitioners tasked with individual cases.

The field of Transnational Criminal Law can learn three main things from the pluralist discussion on global governance. First, real problems exist both theoretically and practically with drafting universal norms to counter organized crime for such socially and culturally diverse polity, as is the ‘global community’. Second, promoting or developing responses to organized crime from the practices and experience of different nation states seem to require “interdisciplinary understanding of functionalist comparisons”<sup>173</sup> of the relevant legal and non-legal norms, routines and social practices in their appropriate context. Finally, this contests the narrow scope of Transnational Criminal Law as a platform for legal discourse about transnational crime, such as organized crime, as Transnational Criminal Law is by definition limited to how international law *stricto sensu* indirectly suppresses criminal activity through the use of ‘penal law’ – in the face of evidence of International Soft Law indirectly suppressing criminal activity through non-criminal justice responses.

## **Literature on domestic Non-Criminal Justice Responses to Organized Crime**

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<sup>171</sup> Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 Global Constitutionalism, 16, at p 51.

<sup>172</sup> Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 Global Constitutionalism, 16, at p 50 – 51. Zumbansen, Peer, ‘Transnational comparisons: theory and practice of comparative law as a critique of global governance’ in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186, at p 204 and 206.

<sup>173</sup> Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 Global Constitutionalism, 16, at p 51.

Non-criminal justice responses for the countering of criminal behaviour can be divided into two categories: responses that focus on proceeds of crime, versus a wider range of preventive and disruptive responses to criminal activities. The latter approach is the main subject of this thesis. The former approach, to utilize non-criminal justice responses for going after assets suspected to be instruments or proceeds of crime, in particular so called non-conviction based forfeitures and money laundering has been substantively discussed in academic debate. Hence, it is not deemed necessary or useful to re-examine in detail the criminal asset approach here, however, a short account must be given for the sake of context and to make use of observations already made as part of that discussion. For a more detailed coverage of the proceeds of crime approach Angela Leong offers a good coverage with emphasize on the United Kingdom in here book 'The Disruption of International Organized Crime'.<sup>174</sup>

#### Focus on the proceeds of crime

The category that emphasizes the proceeds of crime can be said to have two main approaches, one that focuses on preventing assets from the illicit economy from entering the licit one, and another that focuses on ways to deprive criminals of assets that are found to be proceeds of crime or instruments of crime.

#### *Countering Money Laundering*

Wide variety of responses have been introduced for countering money laundering, the act of moving assets from the illicit economy into the licit one. Part of the approach has been to criminalize the conduct, but additionally, responses have been introduced for making financial information accessible, ensure review of this information and to place duties on the private sector to report suspicious transactions. Moreover, these actions have been promoted at the international level.<sup>175</sup>

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<sup>174</sup> Leong, Angela, *The Disruption of International Organised Crime: An Analysis of Legal and Non-Legal Strategies* (Ashgate Pub Co 2007).

<sup>175</sup> Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 *Journal of Money Laundering Control*, 16, at p 16.

Most importantly the Financial Action Task Force has contributed heavily to bringing about national legislations and regulations to counter money laundering.<sup>176</sup> In fact, the recommendations of the Financial Action Task Force can be said to have set the international standards for domestic legislations and regulatory framework for countering money laundering.<sup>177</sup> The task force even examines if member states adhere to the recommendations, and noncompliant member states can be 'blacklisted'.<sup>178</sup>

These recommendations are a unique example of how 'International Soft Law', with no legally binding force and no formal International Law enforcement mechanism, has been able to shape international standards and national legislations.<sup>179</sup> Studies have shown incredible compliance to the recommendations and suggestions of the Financial Action Task Force, showing how soft International Law can bring about just as much compliance or even more compliance than International Law *stricto sensu* sometimes called 'International Hard Law'.<sup>180</sup>

Additionally, the Financial Action Task Force recommendations show non-criminal justice responses to be utilized to counter criminal activities, as only a portion of the recommendations strive to bring about criminal sanction.<sup>181</sup> Many of the recommendations can be seen to have primarily preventive purposes, in fact a whole chapter is named 'Preventive

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<sup>176</sup> Roberge, Ian, 'Financial Action Task Force' in Thomas Hale and David Held (eds), *The Handbook of Transnational Governance: Institutions and Innovations* (google.ca 2011), 45.

<sup>177</sup> Roberge, Ian, 'Financial Action Task Force' in Thomas Hale and David Held (eds), *The Handbook of Transnational Governance: Institutions and Innovations* (google.ca 2011), 45, at p 47 - 48; Unger, Brigitte, and Johan Hertog, 'Water always finds its way: Identifying new forms of money laundering' (2012) 57 *Crime, Law and Social Change*, 287, at 288 - 289. The Financial Action Task Force, official website <<http://www.fatf-gafi.org>> accessed 8 october 2014. See: under 'About FATF', 'History of the FATF' and 'Members & Observers'.

<sup>178</sup> Roberge, Ian, 'Financial Action Task Force' in Thomas Hale and David Held (eds), *The Handbook of Transnational Governance: Institutions and Innovations* (google.ca 2011), 45, at p 46 - 47; Unger, Brigitte, and Johan Hertog, 'Water always finds its way: Identifying new forms of money laundering' (2012) 57 *Crime, Law and Social Change*, 287, at p 288 - 289.

<sup>179</sup> Unger, Brigitte, and Johan Hertog, 'Water always finds its way: Identifying new forms of money laundering' (2012) 57 *Crime, Law and Social Change*, 287, at 288 - 289; Unger, Brigitte, and Johan Hertog, 'Water always finds its way: Identifying new forms of money laundering' (2012) 57 *Crime, Law and Social Change*, 287, at p 288. See further reading on International Soft Law: Guzman, Andrew T, and Timothy L Meyer, "'International Soft Law" by Andrew T. Guzman, et al.' (2010) 2 *Journal of Legal Analysis*, 171; Ho, Daniel E, 'Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?' (2002) 5 *Journal of International Economic Law*, 647.

<sup>180</sup> Sharman, J C, 'The bark is the bite: International organizations and blacklisting' (2009) 16 *Deviant Behavior*, 573, at p 574 - 575.

<sup>181</sup> Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation', (Financial Action Task Force, February 2012) <<http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatf-recommendations.htm>> accessed 9 October 2014



Measures', these preventive measures should properly be considered non-criminal justice responses.<sup>182</sup>

Money laundering has been the subject of a substantive academic discussion and has been carefully examined, therefore, it will not be re-examined in this work.<sup>183</sup> For the present purposes it is sufficient to show how this international promotion of domestically originated non-criminal justice responses raises questions about how restricted Transnational Criminal Law is, as a field of law. Being restricted to the influence of International Law *stricto sensu* on domestic penal law, when apparently not only penal law is utilized to counter organized crime, and domestic law in the field is being influenced by 'International Soft Law'.

### *Going after the proceeds of crime*

The enormous profit that some individuals have been able to reap from their criminal activity, despite authorities' efforts, has been seen as a major problem.<sup>184</sup> This profit has been said to diminish the deterrence of criminal sanction, where the possible profit is such as to make the punishments appear to be worth the gain.<sup>185</sup> Additionally, the prosperity of individuals involved in criminal activity is seen to serve as an incentive for others to get involved in such criminal activities and have damaging effect on the society, when members of the society observed how those that do not adhere to it's rules prosper from their illicit behaviour.<sup>186</sup> Furthermore, the tremendous assets generated by crime creates vast opportunities for further

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<sup>182</sup> Ibid, at p 14.

Non-criminal justice responses will be used in this work in the wide meaning of all responses that are not criminal justice responses. Criminal justice responses being responses that are based on domestic criminal law of the nation state in question.

<sup>183</sup> For further material on 'Money Laundering' see for example: Beare, Margaret E, and Stephen Schneider, *Money Laundering in Canada: Chasing Dirty and Dangerous Dollars* (University of Toronto Press 2007); Alexander, Kern, 'The International Anti-Money-Laundering Regime: The Role of the Financial Action Task Force' (2001) 4 *Journal of Money Laundering Control*, 231.

<sup>184</sup> Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 *Journal of Money Laundering Control*, 16, at p 16 - 17; Gallant, M Michelle, and Colin King, 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland' (2013) 42 *Common Law World Review*, 91, at p 93 - 94.

<sup>185</sup> Gallant, Mary Michelle, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, Inc. 2005), at p 3; Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 *Journal of Money Laundering Control*, 16, at p 16; Leong, Angela, *The Disruption of International Organised Crime: An Analysis of Legal and Non-Legal Strategies* (Ashgate Pub Co, 2007), at p 104 – 105.

<sup>186</sup> Ibid.

criminal activity, where the assets could be used as instruments of crime and to evade detection and punitive actions.

New strategy evolved in some nation states and at the international level, where the objective was to go after the proceeds of crime to take away these incentives and instruments of crime.<sup>187</sup>

One of these strategies introduced non-conviction based forfeiture, where the state takes actions outside the criminal justice system to deprive those suspected of criminal activity of their ill gotten gain. The utilization of non-criminal justice responses to go after the proceeds of crime as an approach to countering criminal activity, and organized crime in particular, has been sufficiently examined in academic discussion and it is not considered necessary to re-examine the approach in this work.<sup>188</sup> Therefore, for present purposes it is sufficient to give a short account of the approach.

### *Non-Conviction Based Forfeiture*

The utilization of non-conviction based forfeiture for the purpose of going after the proceeds of crime has been said to have originated from efforts of authorities in the United States of America to counter piracy in the Caribbean in the late 1700s.<sup>189</sup> Frequently in those piracy cases, ship, the cargo and the crew could be seized, but the owner could not be brought to justice. Consequently, a new enactment was introduced that allowed the government to bring a case *in*

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<sup>187</sup> Leong, Angela Veng Mei, *The Disruption of International Organised Crime: An Analysis of Legal and Non-Legal Strategies* (Ashgate Pub Co 2007), at p 137 – 179; Gallant, Mary Michelle, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, Inc. 2005), at p 3; Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 Journal of Money Laundering Control, 16.

<sup>188</sup> See for example: Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 Journal of Money Laundering Control, 16; Gallant, Michelle M. and King, Colin, 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland' (2013) 42 Common Law World Review 91; Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013) <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014; Kennedy, Anthony, 'Designing a civil forfeiture system: an issues list for policymakers and legislators' (2006) 13 Journal of Financial Crime; Cassella, Stefan D, 'The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime' (2008) 11 Journal of Money Laundering Control, 8; Simser, Jeffrey, 'Perspectives on civil forfeiture' in Simon N M Young (ed), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc. 2009), 13; King, Colin, 'Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland' (2013) 34 Legal Studies, 371.

<sup>189</sup> Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 Journal of Money Laundering Control, 16, at p 21.

rem against the pirate ship itself or its cargo.<sup>190</sup> By bringing a forfeiture action against the properties themselves, the owner was forced to come forward if he wanted to challenge the forfeiture.

Forfeiture as part of the penal process has been known since the Roman times. However, the criminal forfeiture process traditionally utilized to seize profits of crime has its limitations.<sup>191</sup> Criminal forfeiture can only be executed following a guilty verdict in a criminal proceeding. Also, only assets acquired by the crime proven and instruments of that crime can be forfeited from the defendant, or in some cases the equivalent of the proceeds of the crime in question if the assets themselves can not be acquired. Additionally, generally only assets of the defendant himself can be forfeited in the criminal process, not assets of relatives, companies or other related persons or entities - nor criminal organizations or members of such organizations suspected of having gained from the criminal actions of the defendant.<sup>192</sup> Criminal forfeiture is by definition a criminal justice response and as such outside the scope of this thesis, the subject will therefore not be examined further here.

The utilization of non-conviction based forfeiture became common practice in the 1980s when the approach was found fitting and useful for the drug prohibition enforcement.<sup>193</sup> Much like with the piracy cases of the 18th and 19th century, the mastermind of an international drug organization and the owner of the drugs and properties used for trafficking or manufacturing were not readily identified, let alone brought to justice. The approach, now increasingly dealing with drug enforcement, had to be adjusted to allow for civil forfeiture now dealing with the seizure and forfeiture of modern day assets; vehicles, businesses, real estates and bank accounts,

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<sup>190</sup> Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013 <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014, at p 7.

<sup>191</sup> Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 *Journal of Money Laundering Control*, 16, at p 16; Gallant, M Michelle, and Colin King, 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland' (2013) 42 *Common Law World Review*, 91, at p 93 - 94; Collins, Martin, and Colin King, 'The disruption of crime in Scotland through non-conviction based asset forfeiture' (2013) 16 *Journal of Money Laundering Control*, 379, at p 382.

<sup>192</sup> Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 *Journal of Money Laundering Control*, 16, at p 16 - 17; Gallant, M Michelle, and Colin King, 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland' (2013) 42 *Common Law World Review*, 91, at p 93 - 94.

<sup>193</sup> Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013 <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014, at p 8.

had to be adjusted to modern day basic civil rights.<sup>194</sup> Still, it is debated if the proceedings have reached the point of being compatible with modern day basic rights.<sup>195</sup>

It is of specific interest for this work how civil forfeiture has been utilized for countering outlaw motorcycle gangs in Canada, where authorities have seized and forfeited club houses of gangs such as the Hells Angels MC.<sup>196</sup> Many of these cases are still being processed through the judicial system. Amongst the main issues being debated is the procedural rights that should be applicable in civil forfeiture cases, and the level of proof required to seize and forfeit assets as “instruments of unlawful activity” or “proceeds of unlawful activity.”<sup>197</sup>

The approach of using non criminal justice responses to go after the proceeds of crime has been further developed to allow for wider variety of ways to go after the suspected criminal profits. In some countries, including Ireland and the United Kingdom, the approach to go after criminal profit has been taken one step further, by intertwining in one autonomous agency multiple efforts for preventing the enjoyment of the proceeds of crime.<sup>198</sup> The agency in Ireland investigates suspicions of criminal profits, forfeit such profits if possible, but alternatively makes sure it is treated as any other income or asset with regards to revenue law and social benefits.<sup>199</sup> The agency is made up of officials from multiple agencies, including the Irish National Police, the Irish Customs, the Irish Revenue Service and the Department of Social and Family Affairs.<sup>200</sup>

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<sup>194</sup> Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013 <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014

, at p 8.

<sup>195</sup> Gallant, Mary Michelle, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, Inc. 2005), at p 88 - 108. King, Colin, ‘Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland’ (2013) 34 *Legal Studies*, 371.

<sup>196</sup> Ministry of the Attorney General, ‘Civil Forfeiture in Ontario’ (News Ontario, press release September 24, 2013), <<http://news.ontario.ca/mag/en/2013/09/civil-forfeiture-in-ontario-33.html>> accessed 7 January 2015; Bolan, Kim, and Mike Hager, ‘B.C. Hells Angels may have a chance with challenge of Civil Forfeiture Act: expert’ (Vancouver Sun, March 21, 2014).

<sup>197</sup> Mulgrew, Ian, ‘Civil forfeiture office losing battle against Hells Angels’ (Montreal Gazette, 8 November 2014); Bolan, Kim, and Mike Hager, ‘B.C. Hells Angels may have a chance with challenge of Civil Forfeiture Act: expert’ (Vancouver Sun, March 21, 2014).

<sup>198</sup> Campbell, Liz, ‘Taxing Illegal Assets: The Revenue Work of the Criminal Assets Bureau’ (2006), 316, at p 318. Citing: s. 19 of the Finance Act 1983; Dáil Debates, May 5, 1983, Vol.342, Cols.463–464 per Mr Molony (the *travaux préparatoires*); Leong, Angela, *The Disruption of International Organised Crime: An Analysis of Legal and Non-Legal Strategies* (Ashgate Pub Co 2007), at p 139 – 140.

<sup>199</sup> Barrett, Richard, ‘Proceedings taken by the Criminal Assets Bureau’ [2007] *Judicial Studies Institute Journal*, 229; Campbell, Liz, ‘Taxing Illegal Assets: The Revenue Work of the Criminal Assets Bureau’ (2006), 316

<sup>200</sup> Campbell, Liz, ‘Taxing Illegal Assets: The Revenue Work of the Criminal Assets Bureau’ (2006), 316, at p 316 - 318.

The legal framework allows for extensive cooperation of these agencies and information sharing between them.<sup>201</sup>

The Irish approach has gained well deserved attention, in particular within the European Union, where Europol is promoting the Irish model as best practice.<sup>202</sup>

### *Considerations relevant for going after proceeds of crime under civil law*

A substantive academic discussion has evolved around the subject of non-conviction based forfeiture and its use to counter organized crime, for present purposes it is sufficient to give an overview of the discussion.

The argument supporting non-conviction based forfeiture mainly relies on how criminal profits give incentive and means for further criminal activities, and the argument that crime should not pay, emphasizing that it is socially harmful if they do.<sup>203</sup> The argument claims the criminal forfeiture process to be insufficient instrument for seizing criminal assets.<sup>204</sup>

Subsequently, causing criminally obtained assets to be left at the convicts' disposal or in the hands of individuals involved in crime, as both an incentive and an instrument for further crime. In the organized crime context, such assets have been claimed to give high level criminals the means to commit crime and avoid being held accountable. Subsequently, the forfeiture of these assets makes them more vulnerable to detection and capture.<sup>205</sup>

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<sup>201</sup> Campbell, Liz, 'Taxing Illegal Assets: The Revenue Work of the Criminal Assets Bureau' (2006), 316, at p 317. Barrett, Richard, 'Proceedings taken by the Criminal Assets Bureau' [2007] Judicial Studies Institute Journal, 229, at p 230.

<sup>202</sup> O'Keeffe, Cormac, 'European Criminal Assets Bureau based on CAB' (October 16, 2009). Simser, Jeffrey, 'Perspectives on civil forfeiture' in Simon N M Young (ed), Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime (Edward Elgar Publishing, Inc. 2009), 13, at p 17 - 18

<sup>203</sup> Simser, Jeffrey, 'Perspectives on civil forfeiture' in Simon N M Young (ed), Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime (Edward Elgar Publishing, Inc. 2009), 13; Kennedy, Anthony, 'Justifying the civil recovery of criminal proceeds' (2004) 12 Journal of Financial Crime, in particular at p 9 - 10; Cassella, Stefan D, 'The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime' (2008) 11 Journal of Money Laundering Control, 8, at p 8 - 10; Nikolov, Nikolay, 'General characteristics of civil forfeiture' (2011) 14 Journal of Money Laundering Control, 16, at p 16 - 17.

<sup>204</sup> Ibid.

<sup>205</sup> Collins, Martin, and Colin King, 'The disruption of crime in Scotland through non-conviction based asset forfeiture' (2013) 16 Journal of Money Laundering Control, 379.

Consequently, it has been considered necessary to provide the state with further abilities to seize the profits driving from criminal activities, in particular serious and organized crime.<sup>206</sup> This kind of forfeiture has been argued to be a preventive measure and not a punitive one, where the state is only recovering illegally acquired assets - assets that have arguably never legitimately become the property of those that acquired them through illegal actions.<sup>207</sup>

The critics have pointed out that the civil forfeiture remedy has been utilized in cases that have nothing to do with organized crime and in some cases the crimes can hardly be argued to have been committed for profit.<sup>208</sup> Consequently, undermining the argument that this kind of approach is necessary for the purpose of countering organized crime kingpins or making sure crimes do not pay. An example of both would be the forfeiture of a house belonging to a sports couch guilty of sexually exploiting a teenager, where authorities forfeited the house as an instrument of the crimes committed there.<sup>209</sup>

Most importantly though, the critics have argued that non-conviction based forfeiture is punitive in nature - in fact criminal punishment by another name - and therefore requiring the full protection of the criminal procedural safeguards.<sup>210</sup> Consequently, the main criticism of non-

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<sup>206</sup> Kennedy, Anthony, 'Justifying the civil recovery of criminal proceeds' (2004) 12 *Journal of Financial Crime*, at p 9 - 10; Simser, Jeffrey, 'Perspectives on civil forfeiture' in Simon N M Young (ed), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc. 2009), 13, at p 15 and 20; Cassella, Stefan D, 'The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime' (2008) 11 *Journal of Money Laundering Control*, 8.

<sup>207</sup> Kennedy, Anthony, 'Justifying the civil recovery of criminal proceeds' (2004) 12 *Journal of Financial Crime*, at p 16 - 17 and 12 - 14.

<sup>208</sup> Gallant, M Michelle, and Colin King, 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland' (2013) 42 *Common Law World Review*, 91, at p 98; Citing: CBC News, 'Lawsuit over Man. house spurs rights concerns' (CBC News, December 30, 2010) <<http://www.cbc.ca/news/canada/manitoba/lawsuit-over-man-house-spurs-rights-concerns-1.950034>> accessed 29 October 2014; Welch, Mary Agnes, 'The long reach of the law' (Winnipeg Free Press, February 22, 2014) <<http://www.winnipegfreepress.com/local/The-long-reach-of-the-law-246578531.html>> accessed 29 October 2014; King, Colin, 'Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland' (2013) 34 *Legal Studies*, 371, at p 381; Citing: *Air Canada v UK* [1995] 20 EHRR 150.

<sup>209</sup> Gallant, M Michelle, and Colin King, 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland' (2013) 42 *Common Law World Review*, 91, at p 98; Citing: CBC News, 'Lawsuit over Man. house spurs rights concerns' (CBC News, December 30, 2010) <<http://www.cbc.ca/news/canada/manitoba/lawsuit-over-man-house-spurs-rights-concerns-1.950034>> accessed 29 October 2014

<sup>210</sup> Campbell, Liz, 'The Recovery of "Criminal" Assets in New Zealand, Ireland and England' (2010) 41 *Victoria University of Wellington Law Review*. Gallant, Mary Michelle, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, Inc. 2005).

conviction based forfeiture has been focused on its incompatibility with human rights guaranteed to those criminally accuse and the sidestepping of criminal procedural safeguards.<sup>211</sup>

The human rights argument evolves mostly around the right to fair trial for example under article 6 of the European Convention of Human Rights.<sup>212</sup>

A major issue raised with respect to fundamental principles of law has been how the non-conviction based forfeiture is not based on any requirement to establish personal guilt.<sup>213</sup> The authorities generally acting *in rem*, against the property it self, originally based on the legal fiction of assigning liability or fault to the property it self.<sup>214</sup> This legal fiction is said to be less relied up on today, replaced by a pragmatic reasoning that authorities must be able to seize illegally acquired property and property used or intended to be used for criminal purposes even if requirements for punishment are not, or can not be met.<sup>215</sup> Instead of acting against multiple individuals, some of which might not be easily reachable, actions are taken against the property and all possible stakeholders given notice and the option to get involved in the proceedings and defend their interests in the property.

Another major concern has been the appropriateness of ‘balance of probability’ as the standard of proof instead of the criminal standards of proof ‘beyond reasonable doubt’.<sup>216</sup>

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<sup>211</sup> Campbell, Liz, ‘The Recovery of “Criminal” Assets in New Zealand, Ireland and England’ (2010) 41 Victoria University of Wellington Law Review. Gallant, Mary Michelle, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, Inc. 2005). King, Colin, ‘Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland’ (2013) 34 Legal Studies, 371.

<sup>212</sup> King, Colin, ‘Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland’ (2013) 34 Legal Studies, 371.

<sup>213</sup> Collins, Martin, and Colin King, ‘The disruption of crime in Scotland through non-conviction based asset forfeiture’ (2013) 16 Journal of Money Laundering Control, 379, at p 384; Campbell, Liz, ‘The Recovery of “Criminal” Assets in New Zealand, Ireland and England’ (2010) 41 Victoria University of Wellington Law Review, at p 24 onward; Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013 <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014, at p 5, 11 and 16.

<sup>214</sup> Gallant, M Michelle, ‘Ontario (Attorney General) v. \$29,020 in Canadian Currency: A Comment on Proceeds of Crime and Provincial Forfeiture Laws’ (2006) 52 Criminal Law Quarterly, 64, at p 68 – 69; Nelson, Max M, ‘Federal Forfeiture and Money Laundering: Undue Deference to Legal Fictions and the Canadian Crossroads’ (Autumn 2009), 43, at p 45

<sup>215</sup> Cassella, Stefan D, ‘The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime’ (2008) 11 Journal of Money Laundering Control, 8, at p 9 – 10; Kennedy, Anthony, ‘Justifying the civil recovery of criminal proceeds’ (2004) 12 Journal of Financial Crime, 8, at p 8 – 10 and 16 – 17.

<sup>216</sup> Gallant, M Michelle, and Colin King, ‘The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland’ (2013) 42 Common Law World Review, 91, at p 95 - 99; Campbell, Liz, ‘The Recovery of “Criminal” Assets in New Zealand, Ireland and England’ (2010) 41 Victoria University of Wellington Law Review.; Kennedy, Anthony, ‘Justifying the civil recovery of criminal proceeds’ (2004) 12 Journal of Financial Crime, at p 17 - 18; Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013 <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014, at p 14 - 15.

Effectively, under this standard of proof the state has only to make it more likely than not for an asset to be driving from a criminal activity. Specifically so, as there is not presumption of innocence, the absents of which is another concern that has been raised.<sup>217</sup> Together the above concerns have been argued to create an unfair dilemma for those suspected of holding criminally obtained assets, having to choose if to defend against the non-conviction based forfeiture and risk incriminating themselves, or to be able to enjoy their right under the criminal procedural safeguards to remain silent in regards to related pending or possible criminal charges.<sup>218</sup>

Finally, the disposal of the forfeited assets has been the subject of some discussion. Critics have claimed that the practice of having the law enforcement agencies gain from the forfeiture of criminal assets, might bring the focus of law enforcement authorities on cases where assets could be forfeited, risking to create a policing for profit incentive.<sup>219</sup> The counterarguments have been that going after the criminal profit can be expensive and therefore an incentive is needed, also, that the society as a whole suffers harm from crimes and financing effective law enforcement is a suitable compensation.<sup>220</sup> Noticeably, some jurisdictions have made a policy decision not to have law enforcement agencies benefit from forfeited assets.<sup>221</sup>

The European Union has taken interest in promoting the approach to go after the proceeds of crime.<sup>222</sup> The Union enacted a directive 'on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union' in April 2014. The original

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<sup>217</sup> Kennedy, Anthony, 'Justifying the civil recovery of criminal proceeds' (2004) 12 Journal of Financial Crime, at p 18.

<sup>218</sup> Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013 <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014, at p 17; Kennedy, Anthony, 'Justifying the civil recovery of criminal proceeds' (2004) 12 Journal of Financial Crime, at p 18.

<sup>219</sup> Worrall, John L, and Tomislav V Kovandzic, 'Is Policing for Profit? Answers from Asset Forfeiture' (2008) 7 Criminology & Public Policy, 219; Skolnick, Jerome H, 'Policing Should not be for Profit' (2008) 7 Criminology & Public Policy, 257.; Baumer, Eric P, 'Evaluating the Balance Sheet of Asset Forfeiture Laws: Towards Evidence-Based Policy Assessments' (2008) 7 Criminology & Public Policy, 245. Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013 <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014, at p 3.

<sup>220</sup> Cassella, Stefan D, *Civil Asset Recovery: The American Experience* (SelectedWorks, 2013 <[http://works.bepress.com/stefan\\_cassella/30/](http://works.bepress.com/stefan_cassella/30/)> accessed 29 October 2014, at p 3.

<sup>221</sup> Collins, Martin, and Colin King, 'The disruption of crime in Scotland through non-conviction based asset forfeiture' (2013) 16 Journal of Money Laundering Control, 379, at p 385 - 386

<sup>222</sup> 'Directive 2014/42/EU of the European Parliament and the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union' (Official Journal of the European Union April 29, 2014), at p 39.



proposal would have obligated the member states to adopt non-conviction based forfeiture, but was altered so non-conviction based forfeiture does not have to be introduced except in limited circumstances where confiscation based on criminal conviction was impossible due to “. . . illness or absconding of the suspected or accused person,”<sup>223</sup>.<sup>224</sup> Of the 28 member states of the European Union, only Italy, Ireland and the United Kingdom allow for non-conviction based forfeiture.<sup>225</sup> Never the less, the Commission of the European Union seems to be promoting the utilization of non-conviction based forfeitures in the absence of criminal conviction.<sup>226</sup>

As previously stated the main focus of this thesis is not the proceeds of crime approach. The approach has been substantively discussed in the literature and there is no need to re-examine it in this work. However, the above literature shows how authorities are utilizing non-criminal justice responses in their efforts to deprive criminals of their instruments and proceeds of crime, in particular when it comes to organized crime. The next subchapter will introduce literature that shows how non-criminal justice responses are being utilized to counter crime, and organized crime in particular, in wider context than assets suspected to be instruments or proceeds of crime.

### Wider variety of non-criminal justice responses

Domestic authorities have utilized a variety of non-criminal justice responses for the prevention and disruption of criminal activities such as organized crime. Some of these responses have been discussed in academic literature, while the thesis presupposition is that the variety of non-criminal justice responses utilized by domestic authorities is insufficiently portrayed by the academic discussion.

The disruptive and preventive responses seems to have developed from variety of measures utilized by authorities in New York in the United States of America, to prevent

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<sup>223</sup> Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L127/39, art. 4, para

<sup>224</sup> Alagna, Federico, ‘Non-conviction Based Confiscation: Why the EU Directive is a Missed Opportunity’ [2014] European Journal on Criminal Policy and Research, at p 9 - 14.

<sup>225</sup> Ibid, at p 7.

<sup>226</sup> Ibid, at p 13.

criminal organizations from participating in publicly funded or regulated businesses, and from control orders that were originally used at the beginning of this century in the terrorism context in the United Kingdom.<sup>227</sup> Scholars claim control orders to have been initiated to circumvent legal obstacles for indefinite detention of terrorist suspects.<sup>228</sup> Its uptake in the general criminal context happened only a few years later when these control orders inspired new techniques and legislations for countering organized crime and anti-social behaviour.<sup>229</sup> The new approach was introduced on account of the difficulties that criminal law tends to have with countering organized crime on one hand, and on the other hand individual behaviour that is either not criminal or represented minor offences carrying minor penalties but causes harassment, alarm or distress to other people.<sup>230</sup> The New York approach inspired variety of responses that allow for serious and organized criminality to be considered in a variety of administrative decision making, with the objective of preventing or disrupting criminal activity.<sup>231</sup>

The main discussions in the United Kingdom about non-criminal justice responses has evolved around so-called Anti-Social Behaviour Orders proposed in 1995 and introduced as part of the Crime and Disorder Act 1998. The Anti-Social Behaviour Order allowed for a court order imposed on individuals for anti-social behaviour, banning the individual from certain acts or omission from specific locations, etc. Breach of these orders without a reasonable excuse is a

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<sup>227</sup> See on the influence of control orders in the terrorism context: Ayling, Julie, 'Criminalizing Organizations: Towards Deliberative Lawmaking' (2011) 33 *Law & Policy*, 149, at p 164. Citing Zedner. Zedner, Lucia, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems*, 174, at p 175 - 176. Loughnan, Arlie, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)' (2009) 20 *Current Issues in Criminal Justice*, 457, at p 458 - 459.

See on the influence of administrative responses in New York: Nelen, Hans, and Wim Huisman, 'Breaking the Power of Organized Crime? The Administrative Approach in Amsterdam' in Frank Bovenkerk and others (eds), *Studies in Organized Crime*, vol. 7 (Springer New York 2008), 207, at p 207.

<sup>228</sup> Crawford, Adam, 'Governing Through Anti-social Behaviour' (2009) 49 *British Journal of Criminology*, 810, in particular at p 826. Macdonald, Stuart, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour'' (2006) 69 *Law & Policy*, 183 at p 183.

<sup>229</sup> Ayling, Julie, 'Criminalizing Organizations: Towards Deliberative Lawmaking' (2011) 33 *Law & Policy*, 149, at p 164. Citing: Zedner, Lucia, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems*, 174, at p 175 - 176. Loughnan, Arlie, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)' (2009) 20 *Current Issues in Criminal Justice*, 457, at p 458 - 459.

<sup>230</sup> Macdonald, Stuart, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour'' (2006) 69 *Law & Policy*, 183, in particular at p. 197.

<sup>231</sup> Nelen, Hans, and Wim Huisman, 'Breaking the Power of Organized Crime? The Administrative Approach in Amsterdam' in Frank Bovenkerk and others (eds), *Studies in Organized Crime*, vol. 7 (Springer New York 2008), 207.

criminal offence - leading to a criminal justice response.<sup>232</sup> A variety of actors; local authorities, police and other actors can seek the court order.<sup>233</sup>

This approach has met heavy criticism for circumventing due-process protections under English Law.<sup>234</sup> Primarily the approach was criticized for requiring only the civil standard of proof of 'preponderance of the evidence' and for allowing hearsay witnesses.<sup>235</sup> The criticism echoes the concerns raised over non-criminal justice responses for depriving criminals of assets suspected of being instruments or proceeds of crime, such as non-conviction based forfeitures, covered above. The House of Lords decided to raise the standard of proof to almost the same as in criminal law - 'beyond reasonable doubt'.<sup>236</sup>

The implementation of the orders has raised other concerns. Mainly that the term anti-social behaviour is so broadly defined that it has allowed for a rapid growth in the scope of the Anti-Social Behaviour Orders. The orders have therefore been utilized to counter behaviour that ranges from being criminal, to activity that could be described as a dispute or nuances between neighbours.<sup>237</sup> Additionally the lack of constraint on the kind of orders that the courts can issue has been criticized. Due to this lack of limitation, the courts have issued wide ranging limitations on peoples liberty; sometimes it can even be hard to see the connection between the order issued and the behaviour intended to prevent.<sup>238</sup> Court orders have been introduced to restrict activity that is neither criminal nor anti-social in themselves, such as entering a building

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<sup>232</sup> Macdonald, Stuart, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour'' (2006) 69 Law & Policy, 183, at p 184.

<sup>233</sup> Macdonald, Stuart, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour'' (2006) 69 Law & Policy, 183, at p 184.

<sup>234</sup> Crawford, Adam, 'Governing Through Anti-social Behaviour' (2009) 49 British Journal of Criminology, 810, at p 826.

<sup>235</sup> Crawford, Adam, 'Governing Through Anti-social Behaviour' (2009) 49 British Journal of Criminology, 810, at p 818, footnote 5. Von Hirsch, Andrew, Ashworth, Andrew, Wasik, Martin, Smith, ATH, Rod Morgan, Rod, and Gardner, John, 'Overtaking on the Right' (1995) 145 New Law Journal, 1501, at fourth subchapter.

<sup>236</sup> Ibid. R (McCann and others) v. Crown Court at Manchester [2003] 1 A.C. 787. As cited in Crawford, Adam, 'Governing Through Anti-social Behaviour' (2009) 49 British Journal of Criminology, 810, at p 818 footnote 5.

<sup>237</sup> Macdonald, Stuart, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour'' (2006) 69 Law & Policy, 183, at p 184 - 186, 190 197 - 199 and 206; Von Hirsch, Andrew, Ashworth, Andrew, Wasik, Martin, Smith, ATH, Rod Morgan, Rod, and Gardner, John, 'Overtaking on the Right' (1995) 145 New Law Journal, 1501, at third subchapter.

<sup>238</sup> Crawford, Adam, 'Governing Through Anti-social Behaviour' (2009) 49 British Journal of Criminology, 810, at p 821. Macdonald, Stuart, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour'' (2006) 69 Law & Policy, 183, at p 197 - 198.

taller than four stories high or entering any car park in England or Wales.<sup>239</sup> Again, these concerns are in line with concerns raised over the utilization of non-conviction based forfeitures and their legal basis lacking restraints on the scope of these responses.

Aside from Anti-Social Behaviour Orders, there are other civil law based court orders directed at crimes in the UK that are heavily debated. The previously mentioned control orders under the Prevention of Terrorism Act (PTA) 2005 are a good example. Scholars have criticized that the control orders, amounting to limitation of liberty, are being issued while the standard of proof is only that of ‘reasonable grounds for suspecting’.<sup>240</sup>

Australian authorities enacted control order legislations in the organized crime context after a number of violent incidences involving so-called Outlaw Motorcycle Gangs (often referred to as OMG or OMCG). In response, a number of the Australian states introduced legislation that was tailored to counter the Outlaw Motorcycle Gangs, sometimes referred to as the OMCG law. Like in the United Kingdom, and under influence from the United Kingdom, control orders had previously been introduced in Australia in the terrorist context.<sup>241</sup>

These legislations are marginally different, but bear though many similarities. These legislations all provide a process through which organizations can be declared a ‘declared organization’. The police authorities can then request a court to impose control orders on members of the declared organization.

These control orders can be wide-ranging. Julie Ayling notes that the control orders are intended to limit the ability of a controlled person to associate and communicate with specific other individuals. These other individuals can be members of the same or other declared organizations, but they can also be non-members. The control orders “. . . may also prohibit the person from entering or being near certain premises, applying for or undertaking certain

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<sup>239</sup> Macdonald, Stuart, ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of ‘Anti-Social Behaviour’’ (2006) 69 Law & Policy, 183, at p 197.

<sup>240</sup> Zedner, Lucia, ‘Preventive Justice or Pre-Punishment? The Case of Control Orders’ (2007) 60 Current Legal Problems, 174, at p 176 - 179.

<sup>241</sup> Ayling, Julie, ‘Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs’ (2011) 36 American Journal of Criminal Justice, 250, at p 258. Loughnan, Arlie, ‘The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)’ (2009) 20 Current Issues in Criminal Justice, 457, at p 258 - 259.

occupations or possessing specified articles . . .”<sup>242</sup> Breach of the control order can bring with it a criminal punishment of up to five years imprisonment.

These legislations have met criticism for being “draconian and inconsistent with the usual standards for criminal proceedings”<sup>243</sup>, particularly caused by evidential and procedural innovations as noted by Ayling:

“The ire of lawyers, in particular, has been sparked by some evidential and procedural innovations (varying between the different states’ laws), such as a requirement for only a civil standard of proof for questions of fact, the removal of any need to give reasons for declaration decisions, the ousting of rights of review for decisions about declarations and control orders, and the reversal of the onus of proof for exemptions from a control order’s prohibitions on associations.”<sup>244</sup>

Under the Outlaw Motorcycle Gangs legislations an individual can therefore be criminally punished based on a breach of a control order acquired through civil law procedures. The standard of proof for having a control order issued is however not the standards of proof under the criminal law and ‘criminal intelligences’ are allowed.<sup>245</sup> The information that the court bases its decision on, to impose the control order, may even be withheld from the accused.

Likewise, non-criminal justice responses introduced in the Netherlands in recent years have been developed under influence from the Anti-Social Behaviour Orders in the United Kingdom, as well as from administrative responses to organized crime in New York during Guiliani’s rule as mayor in the 1990’s.<sup>246</sup>

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<sup>242</sup> Ayling, Julie, ‘Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs’ (2011) 36 American Journal of Criminal Justice, 250, at p 256.

<sup>243</sup> Ibid

<sup>244</sup> Ibid

<sup>245</sup> Ibid, at p 256 - 257.

“Criminal intelligence is “information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person’s life or physical safety.” (SA Act s.3; see also NSW Act s.3(1); NT Act s.6; Qld Act s.59).” Ibid, at p 256.

<sup>246</sup> Nelen, Hans, and Wim Huisman, ‘Breaking the Power of Organized Crime? The Administrative Approach in Amsterdam’ in Frank Bovenkerk and others (eds), *Studies in Organized Crime*, vol. 7 (Springer New York 2008), 207, at p 207.

Part of this responses has been called the ‘administrative approach’ to prevent organized crime.<sup>247</sup> The initiative is intended to prevent that “. . . services or facilities of the public administration can be exploited to carry out criminal activities or to invest illegally acquired capital.”<sup>248</sup> In the Netherlands, this involves two main projects.

The BIBOB project is a national initiative based on the BIBOB Act.<sup>249</sup> The BIBOB Act provides a legal basis for “refusal or withdrawal of licenses and subsidies and the refusal of participation in public tenders or contracts.”<sup>250</sup> These refusals or withdrawals are an administrative decision, made by administrative authorities based on a risk assessment conducted by a national BIBOB bureau within the Ministry of Justice.<sup>251</sup> The act also provides access for the BIBOB bureau to information that their risk assessment can be based on, from variety of actors within the administrative branch, police and the judiciary. The scope of the BIBOB Act is however limited to selected business sectors.

The Van Traa project is an initiative by local authorities after the prescript offered by Amsterdam’s Red Light District (Wallen) Manager project.<sup>252</sup> The project is intended to prevent the facilitation of organized crime by the administration and to take administrative measures to bar organized crime from legitimate businesses. Similar projects have been adopted in other

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<sup>247</sup> Fijnaut, Cyrille, ‘The administrative approach to organised crime in Amsterdam: Background and developments’ in Cyrille Fijnaut (ed), *The administrative approach to (organised) crime in Amsterdam* (repository.uvt.nl 2002), 15. Nelen, Hans, and Huisman, Wim, ‘Breaking the Power of Organized Crime? The Administrative Approach in Amsterdam’ in Frank Bovenkerk and others (eds), *Studies in Organized Crime*, vol. 7 (Springer New York 2008), 207.

<sup>248</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 *Erasmus Universiteit Rotterdam: Law Review*, 121, at p 135.

<sup>249</sup> As to the meaning of the abbreviation “the BIBOB Act” see: Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 *Erasmus Universiteit Rotterdam: Law Review*, 121, at p 133 footnote 61. “BIBOB is an abbreviation that stands for *Bevorderende Integere Besluitvorming Overheidsbeslissingen*, which is translated as ‘Law for the promotion of integrity assessments by the Public Administration’”

<sup>250</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 *Erasmus Universiteit Rotterdam: Law Review*, 121 at p 133. Nelen, Hans, and Wim Huisman, ‘Breaking the Power of Organized Crime? The Administrative Approach in Amsterdam’ in Frank Bovenkerk and others (eds), *Studies in Organized Crime*, vol. 7 (Springer New York 2008), 207, at p 209.

<sup>251</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 *Erasmus Universiteit Rotterdam: Law Review*, 121, at p 133.

<sup>252</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 *Erasmus Universiteit Rotterdam: Law Review*, 121, at p 134 - 135.

municipals in the Netherlands.<sup>253</sup> The Van Traa project is both limited to specific areas and business sectors, originally established for the Red Light District in Amsterdam but was later expanded to other areas within Amsterdam.<sup>254</sup> However, the Van Traa project is less restricted than the BIBOB Act in the sense that its team does not need indications of organized crime connections to instigate a screening; all businesses in a selected area can be subject to scanning.<sup>255</sup> Additionally, the project is more integrated in the respect that different agencies work together within the project. Consequently a wider range of measures can be taken:

“... these vary from the refusal or withdrawal of licences and permits, the levying of taxes, the closure of certain establishments, to the instigation of a criminal investigation, and, under certain circumstances, the acquisition of real estate by the city itself, all in order to prevent criminals from investing their money in specific objects.”<sup>256</sup>

Wim Huisman and Monique Koemans state that it was anticipated that information from databases of administrative authorities “... would provide a first assessment of risk of organized crime-related activity”.<sup>257</sup> They claim, however, that the information from the police and the judiciary, including criminal intelligence, has become decisive for assessing the risk of a criminal organization related activity.

Also, administrative authorities do not have the ability to check the origin or reliability of these information. Furthermore, the BIBOB Act provides limited access to the information on which decisions are based on, if the information is confidential, limiting the defendants ability to defend against the decision.<sup>258</sup>

Additionally, Huisman and Koemans state that the police have started collecting information, in large criminal investigations, which might be relevant for the decision of

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<sup>253</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 133 - 134.

<sup>254</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 134. Nelen, Hans, and Wim Huisman, ‘Breaking the Power of Organized Crime? The Administrative Approach in Amsterdam’ in Frank Bovenkerk and others (eds), *Studies in Organized Crime*, vol. 7 (Springer New York 2008), 207, at p 208.

<sup>255</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 134 - 135.

<sup>256</sup> Ibid.

<sup>257</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 139.

<sup>258</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 139 - 140.

introducing administrative measures. They claim that judicial authorities use the administrative approach of the Van Traa project as an alternative to criminal law enforcement, where the police were unsuccessful in securing a criminal conviction.<sup>259</sup> Consequently the authors find that the distinction between administrative law and criminal law is blurring when it comes to their application to counter organized crime.<sup>260</sup>

The second phase of the development of non-criminal justice responses in the Netherlands came in 2007 when legislation titled ‘severe anti-social behaviour’ was proposed, introducing measures inspired by the Anti-Social Behaviour Orders in the United Kingdom.<sup>261</sup> The legislation gives local municipal authorities additional powers, and reinforces the existing powers, to deal with ‘persistent and grave’ anti-social behaviour.<sup>262</sup> Under the legislation local authorities can issue restraining orders as an administrative measure, without having to bring the matter before the judiciary.<sup>263</sup> The injunctions can be based on information from law enforcement authorities like the police, but they can also come from administrative authorities like the social services and local educational authorities.<sup>264</sup> If the injunction is breached however, the breach is a criminal act, punishable by fines or imprisonment for up to three months.<sup>265</sup>

Wim Huisman and Monique Koemans note that the anti-social behaviour measures in the Netherlands should be seen as mixture of administrative and criminal law, while the measures in the United Kingdom are a mixture of civil and criminal law.<sup>266</sup>

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<sup>259</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 138 - 140.

<sup>260</sup> Ibid.

<sup>261</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 129 - 130.

<sup>262</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 129 - 130. The proposal introducing ASBO in the Netherlands was passed and is now to be found in art. 172a Gemeentewet. See: Gemeentewet (Municipality Act) from 14 February 1992, art. 172a.

<sup>263</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 130 and 140.

<sup>264</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 130.

<sup>265</sup> Ibid; Wetboek van Strafrecht (Penal Code) from 3 March 1881, art 187

<sup>266</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 129 - 130.



Both these initiatives, the ‘administrative approach’ to organized crime and the introduction of civil law control orders, are to be seen as a development in the direction where policy makers are decreasingly seeing policing and judiciary response as the only feasible response to anti social and criminal behaviour. Previously, detailed involvement towards utilization of non-criminal justice responses for the purpose of depriving criminals of their instruments and proceeds of crime seem to bear evidence of the same development. Authorities seem increasingly to consider non-criminal justice responses, such as administrative and civil law responses, to be necessary to support existing criminal justice efforts intended to counter problems such as organized crime.<sup>267</sup>

Scholarly discussions have criticized this change in approach. The repressive feature of these administrative measures has raised concerns over lack of due process safeguards, compared to criminal law.<sup>268</sup> Dutch legal scholars have reasoned that the procedural rights of criminal law should apply to administrative measures under the Van Traa project and the BIBOB Act. They have claimed that by failing to adhere to the criminal standards, the Netherlands are in breach of the right to fair trial under article 6 of the European Convention of Human Rights.<sup>269</sup>

The above coverage of existing literature shows how domestic responses for countering crime and organized crime in particular are increasingly non-criminal justice responses, as opposed to the traditional approach of utilizing criminal justice responses to counter criminal behaviour. Additionally, the existing literature indicates that this development towards non-criminal justice responses might in fact be to some extent affected by policymaking, promotion and soft law at the international level, contrary to what is the presupposition of this thesis. Consequently, this study researched if the utilization of non-criminal justice responses to counter organized crime was in fact being promoted at the international level.

While the existing literature shows variety of non-criminal justice responses intended to counter substantive criticism and concerns raised, this thesis presupposition is that the variety of non-criminal justice responses utilized domestically to counter organized crime is in fact much

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<sup>267</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 142.

<sup>268</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 139 - 140 and 142.

<sup>269</sup> Ibid

greater than current academic discussion suggests. Consequently, a research was conducted to examine the utilization of non-criminal justice responses to outlaw motorcycle gangs, in Canada, Germany and Iceland. The research findings will be introduced in the next chapter.

# **Domestic Non-Criminal Justice Responses to Organized Crimes**

This chapter will detail the findings of the research conducted. The research had two phases. The first phase of the research was intended to provide information about non-criminal justice responses utilized to counter organized crime by domestic law enforcement authorities in Canada, Germany and Iceland. The second phase of the research was intended to reveal if non-criminal justice responses were being promoted at the international level and if their utilization by domestic authorities was influencing transnational efforts for countering organized crime. This phase of the research was limited to the European Union and the United Nations, these being the main international bodies involved in the suppression of organized crime at the international level according to the literature review on the system of Transnational Criminal Law.

## **Canada**

Canadian authorities use four methods that should be considered to be non-criminal justice responses:

First, deportation under the immigration law of non-citizens that are involved in organized crime; Second, denial of entry of foreign nationals on the borders on the same grounds; Third, the use of roadside check stops the police conducts during rides of Outlaw Motorcycle Clubs from what it appears, mainly for the purpose of information gathering; And fourth, the use of different legislations to close down clubhouses of Outlaw Motorcycle Clubs.

### Deportation

The approach of using deportation to counter organized crime attracted some media attention in 2011 when Mr. Mark Alistair Stables fought deportation from Canada after having been found inadmissible based on his organized criminality. Mr. Stables fought the deportation before the Immigration and refugee board and then brought a case before the Federal Court of

Canada for a judicial review.<sup>270</sup> Both the Immigration and refugee board and the Federal Court took the matter under careful consideration, offering a detailed coverage of the relevant arguments and issues that need to be considered for the deportation of an individual based on organized criminality.

Mr. Stables was a permanent citizen who moved to Canada from Scotland with his parents at the age of 7 in 1969, he grew up, attended school, lived and worked in Canada after he arrived. What lead to Mr. Stables' deportation, started when he arrived on the borders to enter Canada on November 7th, 2006. Before being allowed to enter, he was interviewed by Immigration officials.<sup>271</sup> On that occasion he was found to have in his possession Hells Angels MC paraphernalia and related phone numbers. Resulting from this interview, the Immigration Officer wrote a report of inadmissibility on account of organized criminality.

The Immigration and Refugee board consequently conducted an admissibility hearing.<sup>272</sup> Mr. Stables' membership in the Hells Angels MC was found to be a basis for inadmissibility on ground of organized criminality under subsection 1 of section 37 of the Immigration and Refugee Protection Act. Based on that hearing the board member decided that Stables was inadmissible to Canada, he was consequently issued a deportation order.

The provision of the Immigration and Refugee Protection Act based on which Mr. Stables was found inadmissible, provides that a permanent resident or a foreign national can be found inadmissible on grounds of organized criminality for:

“(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission

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<sup>270</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 1.

<sup>271</sup> ‘Canada (Public Safety and Emergency Preparedness) v. Stables’, 2010 CanLII 96602 (IRB), <<http://canlii.ca/t/fpt1z>> Accessed on 3 July 2012.

<sup>272</sup> ‘Canada (Public Safety and Emergency Preparedness) v. Stables’, 2010 CanLII 96602 (IRB), <<http://canlii.ca/t/fpt1z>> Accessed on 3 July 2012, para 4.

of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.”<sup>273</sup>

Mr. Stables admitted that he was a member in the Hells Angels MC from 2000 but claimed that he terminated his membership in December 2009, after the organization had denied him of support for fighting the deportation.<sup>274</sup> He, however, denied that the Hells Angels MC were criminal organization.<sup>275</sup> Furthermore, he denied any personal involvement in organized crime or crime in general, emphasizing the fact that he has no criminal record.

The Immigration and Refugee board and the Federal Court of Canada found it, however, to be established that the Hells Angels MC were an organization and a criminal organization in the meaning of the Act. The Federal Court quoted the following conclusion of the board:

“There is enough evidence to prove, on reasonable grounds, a connection between criminal offences of Hells Angels members, associates and puppet groups, and the organization. There is evidence of the criminality of its members. Their criminal acts have included drug trafficking, extortion, firearms and explosives offences, and the rampancy of such criminal acts are probative in establishing that the Hells Angels is a criminal organization. It is also apparent that the affiliation with the Hells Angels furnishes members with opportunities to be involved in crime at a depth that may not otherwise be available to them. The panel is also satisfied that the nature and existence of the hierarchy within the Hells Angels, the influence of its leadership, and the incumbent obligations of the members and associates to one another, all foster and under gird the criminal event. This is also an organization that relishes in the power and notoriety of its members, and will employ violence and intimidation to preserve its power and enhance its reputation. It

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<sup>273</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, section 37.

<sup>274</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 2. ‘Canada (Public Safety and Emergency Preparedness) v. Stables’, 2010 CanLII 96602 (IRB), <<http://canlii.ca/t/fpt1z>> Accessed on 3 July 2012, para 149.

<sup>275</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 11.

maintains the sanctuary or fortress of a Hells Angels clubhouse to minimize criminal exposure and infiltration.”<sup>276</sup>

The judge in Stables’ case before the Federal Court of Canada states “it is undeniable that Courts have often upheld a very broad application of subsection 37(1), on the basis that such an interpretation was consistent with Parliament’s objective to ensure the security of Canadians”.<sup>277</sup> The judge never the less finds the term neither to be impermissibly vague nor overbroad, stating the terms in the article “though quite broad and open-ended, are not without limit and do provide sufficient guidance for a legal debate”<sup>278 279</sup>.

The judge specifically noted that Mr. Stables had not even tried to challenge the findings of Hells Angels MC involvement in organized crime activity or endeavour to show them to be unreasonable in his request for a judicial review by the Federal Court.<sup>280</sup>

The federal judge, like the Immigration and Refugee board, found that Mr. Stables was not an “innocent” member that did not know the nature of the organization he was joining until it was too late. On the contrary he found that due to his long standing membership during which he held senior positions in the organization Mr. Stables knew the nature of the organization, finding that “either he did not care or choose to be willfully blind to its activities”.<sup>281</sup>

To establish inadmissibility, evidence must be lead to prove the organized criminality up to the standard of “reasonable ground to believe” under section 37 (1) of the Immigration and Refugee Protection Act.<sup>282</sup> The board cited the Federal Court of Canada case *Chiau v. Canada*:

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<sup>276</sup> ‘Canada (Public Safety and Emergency Preparedness) v. Stables’, 2010 CanLII 96602 (IRB), <<http://canlii.ca/t/fpt1z>> Accessed on 3 July 2012, para 116. As cited in: ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 36.

<sup>277</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 45.

<sup>278</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 51.

<sup>279</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 38 – 53.

<sup>280</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 37.

<sup>281</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 37. On Mr. Stables position, involvement and knowledge of the organization and its activities, see: ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 2, 6, 7 and 44.

<sup>282</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, Section 33 and 37.

“[t]he standard of proof required to establish “reasonable grounds” is more than a flimsy suspicion, but less than the civil test of balance of probabilities. And, of course, a much lower threshold than the criminal standard of “beyond a reasonable doubt.” It is a bona fide belief in a serious possibility based on credible evidence.”<sup>283</sup>

The Federal Court of Canada took under consideration two issues relevant to this study in Mr. Stables’ application for judicial review.<sup>284</sup> First, whether the legislative scheme described in section 37 violated his rights to freedom of expression and freedom of association under the Canadian Charter of rights. Second, whether section 37 of the Act deprived Mr. Stables of right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice.

The court found that section 2 of the Canadian Charter of rights does not protect Mr. Stables right to join the Hells Angels MC, given the violent and criminal activities of that organization.<sup>285</sup> Noting as basis for its decision the Supreme Court of Canada case *Suresh v Canada*.

“It is not in dispute that freedom of expression does not protect expressive activity that take the form of violence. Violence or criminal activity do not involve any of the recognized rationales underlying the constitutional protection of freedom of expression, namely its role as an instrument of democratic government, of truth and of personal fulfilment. Similarly, freedom of association has been found to encompass only lawful activities and cannot protect a person who chooses to belong to a criminal organization.”<sup>286</sup>

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<sup>283</sup> ‘Canada (Public Safety and Emergency Preparedness) v. Stables’, 2010 CanLII 96602 (IRB), <<http://canlii.ca/t/fpt1z>> Accessed on 3 July 2012, para 12. As cited in Canada v Stables [2010]: ‘Chiau v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 9042 (FC)’ (CanLII 3 February 1998), page 3.

<sup>284</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 13.

<sup>285</sup> Ibid, para 37.

<sup>286</sup> Ibid, para 33. Citing: ‘Suresh v Canada (MCI)’, 2002 SCC 1 (CanLII), [2002] 1 SCR 3.

The court furthermore found that due to Mr. Stables long standing membership during which he held senior positions in the organization, Mr. Stables knew the nature of the organization and could not claim to be an ‘innocent’ member.<sup>287</sup>

With regards to principles of fundamental justice Mr. Stables’ claimed that the terms ‘membership’ and ‘criminal organization’ were unconstitutionally vague and overbroad. The court found first that Mr. Stables could in this particular case not claim protection under section 7 of the Canadian Charter of rights - as the principles of fundamental justice under section 7 are not independent rights - but can only be considered after it has been established that an individual is being deprived of life, liberty or security of the person.<sup>288</sup> Still the court decided to examine the arguments and finds the threshold to have been set by the Supreme Court of Canada in *R v Nova Scotia Pharmaceutical Society*. Accordingly:

“a law will only be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. Absolute certainty is not necessary, so long as citizens have a broad understanding of what is permissible and what is not.”<sup>289</sup>

The court finds it undeniable that “Courts have often upheld a very broad application of subsection 37(1), on the basis that such an interpretation was consistent with Parliament’s objective to ensure the security of Canadians.”<sup>290</sup> The court finds however that even if the terms are broad and open ended, they are not without limitations and do provide sufficient guidelines for a legal debate.<sup>291</sup> Therefore the terms fall short of being impermissibly vague.

Mr. Stables’ case shows the Canadian Immigration and Refuge Protection Act to be used to deport individuals on basis of organized criminality and how low level of involvement and proof is needed for the implementation of such deportation. Even more interestingly Mr. Stables’ case, as well as a few additional cases should be seen to indicate that Canadian

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<sup>287</sup> Ibid, para 37. On Mr. Stables position, involvement and knowledge of the organization and its activities, see: para 2, 6, 7 and 44.

<sup>288</sup> Ibid para 39.

<sup>289</sup> Ibid, para 48. Citing: *R v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 SCR 606.

<sup>290</sup> Ibid, para 45.

<sup>291</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012, para 51.



authorities are in some cases opting to deport non-citizens suspected of involvement in organized crime instead of criminally charging them for such involvement.<sup>292</sup> This raises the concern if deportation is sought where evaluation of the evidence concludes then not to be strong enough to prove organized criminality up to the standard of the criminal law.

### Denial of entry

The case of *Collins v Canada* before the Immigration and Refugee board is an example of a case where a foreign national is stopped at the borders and found inadmissible for reasons of organized criminality.<sup>293</sup> The application for judicial review by the Federal Court of Canada was rejected.

Mr. Collins arrived at the Canadian border station from the United States.<sup>294</sup> Mr. Collins claims that he did not intend to enter Canada, but had not realized he was approaching a border station until he could not turn around because how the road was constructed. He claims to have informed the immigration officers of this as soon as he arrived at the border station and asked to be allowed to turn around, without entering Canada. Mr. Collins was wearing clothing bearing the insignia of the Bandidos MC, a well known Outlaw Motorcycle Club, when he arrived at the borders. He was not allowed to turn around but asked if he had any weapons. He admitted to be carrying a gun, which he had a permit for. He was consequently arrested and brought into detention in Canada.<sup>295</sup>

An immigration officer then wrote a report of inadmissibility under article 44 of the Immigration and Refugee Protection Act, claiming him to be inadmissible on grounds of organized criminality, based on his involvement with the Bandidos MC.

The Immigration and Refugee board consequently conducted an admissibility hearing.<sup>296</sup>

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<sup>292</sup> ‘Canada (Citizenship and Immigration) v. Rodriguez, 2009 CanLII 86210 (IRB)’. ‘Sittampalam v. Canada (Minister of Citizenship and Immigration), 2006 FCA 326, [2007] 3 FCR 198’.

<sup>293</sup> ‘Collins v. Canada (Citizenship and Immigration), 2009 CanLII 16327 (FC)’ (CanLII March 17, 2009).

<sup>294</sup> ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’, at p 26.

<sup>295</sup> Ibid.

<sup>296</sup> ‘Canada (Public Safety and Emergency Preparedness) v. Stables’, 2010 CanLII 96602 (IRB), <<http://canlii.ca/t/fpt1z>> Accessed on 3 July 2012, para 4.

Mr. Collins conceded to that he was a member of a specific chapter of the Bandidos MC and that the Bandidos were an organization, “like the Boy Scouts”.<sup>297</sup>

The hearing proceeded to examine if the Bandidos MC were a criminal organization, finding reasonable grounds to believe the association to be a criminal organization.<sup>298</sup>

Based on Collins’ acknowledgment that he was a member of Bandidos MC, found to be a criminal organization, Mr. Collins was found inadmissible on the grounds of organized criminality and deported.<sup>299</sup>

It can be seen from Mr. Collins’ case that Immigration authorities can detain an individual that arrives at Canada’s borders, upon suspicion of his organized criminality, and bring him to a hearing where he could be found inadmissible to Canada. Should the individual be found inadmissible, he cannot return to Canada, except by way of specific permission.<sup>300</sup>

Inadmissibility can be based on mere membership in an organization if there are found to be reasonable grounds to believe the organization in question is involved in crimes<sup>301</sup> or, in the absence of such membership, on the grounds of participation and involvement in the activities of such organization.<sup>302</sup> The standard of proof for findings of fact for such organized criminality is “reasonable grounds to believe”.<sup>303</sup>

### The check stops

Canadian authorities have used so-called “Check Stops” to be able to stop motorists they suspect of being involved in organized crime, especially Outlaw Motorcycle Clubs. The police

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<sup>297</sup> ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’, at p 21 – 22.

<sup>298</sup> ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’, at p 30 - 31.

<sup>299</sup> ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’, at p 30 – 31.

<sup>300</sup> ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’, at p 3.

<sup>301</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012. ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’.

<sup>302</sup> ‘Canada (Minister of Citizenship and Immigration) v. Thanaratnam, 2005 FCA 122 (CanLII)’, at para 31 - 37.

<sup>303</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012.. ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’. ‘Canada (Minister of Citizenship and Immigration) v. Thanaratnam, 2005 FCA 122 (CanLII)’, at para 31 - 37. See on Standard of proof: ‘Canada (Public Safety and Emergency Preparedness) v. Stables’, 2010 CanLII 96602 (IRB), <<http://canlii.ca/t/fpt1z>> Accessed on 3 July 2012, para 12. Also as cited in Canada v Stables [2010]: ‘Chiau v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 9042 (FC)’ (CanLII 3 February 1998), page 3.

has executed these Check Stops as traffic security monitoring, based on provisions of the Highway Traffic Act.<sup>304</sup>

In the cases examined, the police intended these Check Stops to be conducted for multiple purposes in addition to highway safety concerns, including the purpose of gathering intelligence.<sup>305</sup> Showing strong police presence and inconspicuously collecting information about those that were attending specific gatherings seems also to have been intended to reduce the risk of crimes to occur, as those in attendance would know that their presence was known and that a strong and rapid police response was to be expected.

It is in any case evident that the police intended to use powers provided to them by law to conduct Check Stops for purposes other than the legislator intended for when enacting the law providing these powers. Intending to utilize police powers, intended to enhance traffic safety, for the additional purpose of countering organized crime.

The two cases examined reached contradictory conclusions as to the question whether the use of the Check Stops was lawful and withstands Constitutional scrutiny. A full diagnosis of the cases, that potentially could explain these different conclusions, is not necessary for present purposes. For the purpose of this work it is deemed sufficient to assess if Canadian authorities have had and still have the option of using Check Stops as parts of their efforts to counter organized crime.

In *R. v. McCurrach* the detention and photographing at the Check Stops was found to be unconstitutional, while in *Brown v. Regional Municipality of Durham Police Service Board* the

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<sup>304</sup> ‘*R. v. McCurrach*, 2000 ABPC 127 (CanLII)’, para 122. In the case the crown claimed that the powers to execute the Check Stop were granted by section 119 of the Highway Traffic Act, RSA 2000, c H-8, section 89 of the Motor Vehicle Administration Act, RSA 2000, c M-23, section 38 of the Police Act, RSA 2000, and the common law granted them powers to execute the Check Stop.

‘*Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA)’, para 20. In the case the crown claimed that section 216(1) of the Highway Traffic Act, RSO 1990, c H.8 granted the powers to execute the Check Stop.

<sup>305</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 2 - 8. *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 25, 102 - 106 and 114 - 116.

detention and videotaping at the Check Stops was found lawful and withstand constitutional scrutiny.<sup>306</sup>

In both cases the judges examined and rejected the Crowns claim that the Police act or the common law gave the police power for the detention at the Check Stops.<sup>307</sup>

The judge in *R. v. McCurrach* carefully examined the evidence showing that the police had multiple purposes for conducting the Check Stop, and assessed the weight he saw the police put on the different purposes. The judge found the highway security concerns to have been minimal and merely a means to an end - to justify the introduction of the Check Stop for the furtherance of the real purposes for the stop.<sup>308</sup> The judge found, therefore, that the detention was in fact not made on grounds of Highway security concerns, making the detention under the Highway Traffic Act unlawful, even if such detention if made primarily based on highway security concerns could have been lawfully made under the Act.<sup>309</sup>

The judge in *Brown* pursues a different line of reasoning. He rejects that other purposes in addition to the highway security concerns should render the stop and detention unlawful,<sup>310</sup> citing the Supreme Court of Canada case *R. v. Storrey* that the intention to use a lawful detention to further other legitimate purposes did not make a detention unlawful.<sup>311</sup> Except only if: the additional police purposes are illegal; have nothing to do with the execution of a police officer's public duty; infringe the liberty or security of the detained person beyond that contemplated by the purpose that is the basis for the detention; or are in other ways improper.<sup>312</sup> The judge gives

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<sup>306</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 49, 54 – 55. *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 112 - 116.

<sup>307</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 49, 54 – 55 and 78 - 80. *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 139 - 141.

<sup>308</sup> *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 112 - 116.

<sup>309</sup> *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 116.

<sup>310</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 31 and 49.

<sup>311</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 32 - 33. Citing: '*R. v. Storrey*, 1990 CanLII 125 (SCC)' (CanLII February 15, 1990).

<sup>312</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 31 and 39.

examples of unlawful additional purposes such as stopping persons of colour or conducting an unconstitutional search.<sup>313</sup>

The judge in *Brown* states that he agrees with the trial judge that “. . . known criminals should not be more immune from s. 216(1) stops than law abiding citizens who are not known to the police.”<sup>314</sup> Additionally he find that the “gathering of police intelligence is well within the ongoing police duty to investigate criminal activity”. He therefore finds the police to be allowed to use the opportunity produced at the Check Stop.<sup>315</sup>

*Brown* has been cited, as having established the principle “that a lawful police interest beyond highway safety concerns”<sup>316</sup> does not taint a lawful stop based on the Highway Traffic Act.<sup>317</sup> While the Supreme Court of Canada has cited *Brown* as establishing the same, the court has emphasized that “[a] valid regulatory purpose, whether predominant or not, would not sanitize or excuse a Charter violation.”<sup>318</sup>

An additional consideration was how those that were stopped at the Check Stops were not randomly selected. The police decided time and place of the stops on basis of information about activities of specific Outlaw Motorcycle Gangs, and the police stopped only those that were considered to be members of, or involve with outlaw motorcycle gangs.<sup>319</sup>

The judge of the Provincial court of Alberta in *R. v. McCurrach* found that the targeting of the Hells Angels MC at the Check Stops was arbitrary.<sup>320</sup> The judge found the police had not been able to provide reasonable and probable grounds for their claim that the Hells Angels MC were involved in crime as a group.<sup>321</sup> The judge noted that none of those stopped at the Check Stop had been charged for participation in a criminal organization under the criminal law. Based

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<sup>313</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 39.

<sup>314</sup> *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 31.

<sup>315</sup> *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 31.

<sup>316</sup> *R. v. Johnson*, 2013 ONCA 177 (CanLII March 25, 2013), para 23

<sup>317</sup> *Ibid.* *R. v. Morris*, 2013 ONCA 223 (CanLII April 9, 2013), para 7

<sup>318</sup> *R. v. Nolet*, 2010 SCC 24 (CanLII June 25, 2010)

<sup>319</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 6. *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 144.

<sup>320</sup> *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 227 - 228.

<sup>321</sup> *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 225 - 228.

on this he found that the targeting of the Hells Angels MC was unreasonable, suggesting that it was arbitrary.<sup>322</sup>

In *Brown* the judge found that the police had sufficient cause to stop the appellants and additionally that reasonable cause was not needed as the stop was lawfully made under the Highway Traffic Act, which does not require cause.<sup>323</sup> The judge was satisfied that members of the Outlaw Motorcycle Clubs were more prone to violations that compromised highway safety than the general public.<sup>324</sup> Agreeing with the trial judge, that the police had information that raised reasonable grounds to believe that an identifiable group raised particular highway safety concerns. Also agreeing that the selective criteria was not “tainted by any coexisting improper purpose.”<sup>325</sup>

At last the judge in *Brown* examined specifically the videotaping by the police of the Check Stops. The judge accepted the Crowns submission that the videotaping was not improper nor did it violate any rights of the individuals stopped. Noting that the videotaping was conducted without any secrecy, in a public place and did not in any way affect the length nor condition of the detentions.<sup>326</sup> The judge referred to Ontario Court of Appeal case *R. v. Parsons* where the judge accepted that videotaping by the police was an example of the use of modern technology by the police, neither illegal nor intrusive upon the person in question.<sup>327</sup>

However, in *R. v. McCurrach* the judge found that the coerced taking of videos and still photos of the detained individuals, by the police at the Check Stop, amounted to an unlawful seizure of permanent records.<sup>328</sup>

The factual differences of the two cases can, however, explain these different findings. In *Brown* the videotaping discussed in that case were not found to affect the condition of the detention. In *R. v. McCurrach* the police made the detained persons remove their helmets,

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<sup>322</sup> Ibid.

<sup>323</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 56.

<sup>324</sup> *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 55.

<sup>325</sup> *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 42 - 43.

<sup>326</sup> Ibid, at para 46 - 49.

<sup>327</sup> Ibid, at para 48. Citing: ‘*R. v. Parsons*, 1993 CanLII 3428 (ON CA)’ (CanLII August 26, 1993).

<sup>328</sup> *R. v. McCurrach*, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, at para 232 - 240.

sunglasses, scarfs, etc., which the judge found to have been to facilitate the taking of the individuals photos, for intelligence purposes.<sup>329</sup> This makes the additional police purposes seem more intrusive for the detained person beyond that contemplated by the purpose that is the basis for the detention, the traffic security concerns.

The conclusion is that the police in Canada are able to use Check Stops based on the Highway Traffic Act for the purpose of countering organized crime, where the selected groups being stopped pose genuine highway security concerns. This seems possible to argue in the case of outlaw motorcycle gangs and other identifiable groups, if for example drug and alcohol consumption can be shown to be particularly common among members.

At a Check Stop the police can then seize the opportunity to pursue other lawful and proper purposes within their spear of duty. Other proper and legitimate purposes might be intelligence gathering related to organized crime or crime in general. However, these additional purposes can not cause more interference to the detained person than needs be for the purpose of the highway traffic security concerns. This use of the Check Stops should be considered not only legitimate but necessary for the police to perform their “essential role” of investigating crime.<sup>330</sup>

News coverage shows that police in Canada continues to use Check Stops based on the Highway Traffic Act as part of their efforts to counter outlaw motorcycle gangs.<sup>331</sup>

### Administrative approach

Authorities in Canada, on occasions, take an administrative approach to countering organized crime. Example of this is the efforts undertaken by authorities to close down the activities of the Bacchus MC’s clubhouse in Saint John, New Brunswick and efforts of authorities in Ontario to revoke the liquor licence of a known member of the Hells Angels MC.

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<sup>329</sup> R. v. McCurrach, 2000 ABPC 127 (CanLII), <<http://canlii.ca/t/5qx9>> Accessed on 10 July 2012, subpara 4 para 28, 53 and 232 - 240.

<sup>330</sup> Brown v. Regional Municipality of Durham Police Service Board, 1998 CanLII 7198 (ON CA), <<http://canlii.ca/t/6gkq>> Accessed on 10 July 2012, at para 31 – 33.

<sup>331</sup> Ip, Stephanie, ‘More than 150 Hells Angels and other bikers block road during police showdown on Vancouver Island’ (Global News, May 5, 2013); Guelph Mercury, ‘Police conduct roadside check at Hell’s Angels gathering in Waterloo’ (Guelph Mercury, August 17, 2013)

According to media coverage the Bacchus MC chapter of Saint John moved out of their clubhouse due to a “do not occupy” order the police sought from the fire marshal’s office.<sup>332</sup>

The Criminal Intelligence Service Canada considers Bacchus MC an outlaw motorcycle gang with strong connections with the Hells Angels MC.<sup>333</sup>

After an incident close to the clubhouse, the president of the Bacchus MC was charged with second degree murder. As part of the criminal investigation that followed, the police obtained a search warrant for the clubhouse. Based on that warrant, the police offered city officials to examine the facilities, in what seems to have been an effort to use administrative powers to bar the group from using this particular facilities.<sup>334</sup> The city officials that the police invited to inspect the premises found “various deficiencies” under “various acts”.<sup>335</sup> Subsequently, the police obtaining a “do not occupy” order.

This seems to be an administrative effort to remove specific activities or specific group from a specific area rather than routine law enforcement in relation to housing in general or clubhouses in particular. This assumption is supported by a statement given by the Saint John police: "We told them we were going to use every means possible to remove them from this area and as a result of that, they are moving voluntarily. We haven't evicted them."<sup>336</sup> This assumption is also supported by the words of Saint John city councillor who claims he was assured by the police that the Bacchus MC were moving out of the city.<sup>337</sup> He also praised the

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<sup>332</sup> CBC News, ‘Bacchus bikers move out of Saint John clubhouse’ (CBC News, July 19, 2012) <<http://www.cbc.ca/news/canada/new-brunswick/story/2012/07/19/nb-bacchus-moving-fire-police.html>> accessed 19 July 2012;

<sup>333</sup> CBC News, ‘Bacchus bikers move out of Saint John clubhouse’ (CBC News, July 19, 2012) <<http://www.cbc.ca/news/canada/new-brunswick/story/2012/07/19/nb-bacchus-moving-fire-police.html>> accessed 19 July 2012; See also: Criminal Intelligence Service Canada, ‘Organized Crime in Canada’ (Criminal Intelligence Service Canada, 2003), at p 14.

<sup>334</sup> CBC News, ‘Bacchus bikers move out of Saint John clubhouse’ (CBC News, July 19, 2012) <<http://www.cbc.ca/news/canada/new-brunswick/story/2012/07/19/nb-bacchus-moving-fire-police.html>> accessed 19 July 2012. Citing Constable Keith Coepland of the major crime unit.

<sup>335</sup> Ibid

<sup>336</sup> Ibid

<sup>337</sup> CBC News, ‘Bacchus bikers move out of Saint John clubhouse’ (CBC News, July 19, 2012) <<http://www.cbc.ca/news/canada/new-brunswick/story/2012/07/19/nb-bacchus-moving-fire-police.html>> accessed 19 July 2012



police for their effort, not only to relocate the club, but also to relocate the club out of the city of Saint John.

Additionally, the police were working on getting the Bacchus MC permanently removed from the property on basis of a Safer Communities and Neighbourhoods legislation.<sup>338</sup>

The ‘Safer Communities and Neighbourhoods legislation is of specific interest to this study as it is a legislation that provides non-criminal justice responses to counter variety of social problems both criminal and non criminal, including organized crime. The legislation provides for a community safety order to be made to prevent activities on or near a property, from adversely affecting a community or neighbourhood, if the activities indicate that the said property “. . . is being habitually used for a specified use.”<sup>339</sup> “[S]pecified use” is detailed in article 1 paragraph 1, and can, for example, be the commission or promotion of a criminal organization offence, or accommodation, aid, assistance or support of criminal organization or its activities.<sup>340</sup>

The order can prohibit individuals from continuing the said activity, require any or all persons to vacate the property, prohibit them from re-entering or re-occupying the property.<sup>341</sup> The order can also require authorities to close the property from use and occupation for a period of up to 90 days.<sup>342</sup>

Also, according to the Act, fortified buildings can be designated as a threat to public safety, providing a basis for ordering such fortifications to be removed.<sup>343</sup> Clubhouses of outlaw motorcycle clubs are known for being fortified.

Police and city authorities in Saint John jointly used administrative measures in an effort to prevent or at least discouraging a specific association, considered to be involved in organized crime, from operating in the city of Saint John.

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<sup>338</sup> CBC News, ‘Bacchus bikers move out of Saint John clubhouse’ (CBC News, July 19, 2012) <<http://www.cbc.ca/news/canada/new-brunswick/story/2012/07/19/nb-bacchus-moving-fire-police.html>> accessed 19 July 2012. Citing Constable Keith Coepland of the major crime unit.

<sup>339</sup> *Safer Communities and Neighbourhoods Act*, SNB 2009, c S- 0.5, at art. 7 para 1 b.

<sup>340</sup> *Safer Communities and Neighbourhoods Act*, SNB 2009, c S- 0.5, at art. 1 para 1.

<sup>341</sup> *Safer Communities and Neighbourhoods Act*, SNB 2009, c S- 0.5, at art. 15 para 2 and 3.

<sup>342</sup> *Safer Communities and Neighbourhoods Act*, SNB 2009, c S- 0.5, at art 15 para 3.

<sup>343</sup> *Safer Communities and Neighbourhoods Act*, SNB 2009, c S- 0.5, at art. 55 and 56.

Administrative measures are therefore considered by this study to be available to, and used by, Canadian authorities for the purpose of countering organized crime.

## Licensing

Considering involvement in criminal organizations such as outlaw motorcycle gangs as part of the criteria for issuing or revoking licences is another example of the administrative approach in Canada.

In 2010, the Registrar of the Alcohol and Gaming Commission of Ontario applied to the Board of the Commission to revoke Mr. Barletta's liquor licence for his bar, 'the Famous Flesh Gordon's'. The Registrar claimed that on account of his membership in the Hells Angels MC, Mr. Barletta failed to fulfill one of the requirements for being issued a license to sell liquor in the first place, allowing the Registrar to revoke the licence under section 15 of the Liquor Licence Act.<sup>344</sup> The requirement that Mr. Barletta is considered to fail to fulfill on account of his membership in the Hells Angels MC is described in subsection 2(d) of section 6:

“(d) the past or present conduct of the persons referred to in subsection (3) affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty;”<sup>345</sup>

However, the Board of the Alcohol and Gaming Commission of Ontario did not find Mr. Barletta's membership in the Hells Angels MC as such to cause him to fail to fulfill the requirement. The board found that his membership as such was not criminal and that the Registrar had to prove the alleged criminal activity of Mr. Barletta to be able to revoke his licence on grounds of “past conduct” under previously mentioned section of the Act.<sup>346</sup>

The Board emphasized that there were no reasons to consider Mr. Barletta to have acted improperly in operating his licensed establishment nor were there reasons to think he will not comply to these rules in the future.

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<sup>344</sup> *Liquor Licence Act*, RSO 1990, c L.19; Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 2 - 3.

<sup>345</sup> *Liquor Licence Act*, RSO 1990, c L.19; Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at s. 6(2)(d).

<sup>346</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 10 - 11

The decision was appealed on the basis that the Board of the Alcohol and Gaming Commission had erred in Law.<sup>347</sup> The Court of Appeal for Ontario accepted the appeal and found the Board to have erred in Law, after an unsuccessful appeal to the District Court.

First, the Court of Appeal found that the Board had erred in applying the standard of proof on ‘balance of probability’, instead of the appropriate lower standard of ‘reasonable ground for belief’.<sup>348</sup> Second, that the Board erred in interpreting too narrowly the test for determining if a licence should be revoked.<sup>349</sup> The Court found the Board to have considered primarily Mr. Barletta’s conducts that had to do with his operation of his licensed establishment and compliance with relevant law and regulations.<sup>350</sup> When in fact the Board would have been right to consider his conducts well beyond his operation of the licensed establishment, as well as his compliance with the law generally and his integrity and honesty. The court noted the legislative intent behind the Act to be “. . . to ensure that licensed establishments will be operated by those who can be counted on to properly serve the public interest, . . .”<sup>351</sup>

The Court of Appeal did, however, not accept that if the Board had proceeded correctly, revocation would have been the only reasonable conclusion that it could have reached.<sup>352</sup> The Court of Appeal’s ruling was, therefore, to send the Registrar’s application for revoking Mr. Barletta’s liquor licence back to the Board of the Alcohol and Gaming Commission of Ontario for reconsideration in accordance with the courts guidance as to the Law.<sup>353</sup>

In it’s ruling, the Court can be seen to reject the Board’s decision that mere membership in a criminal organization could not establish a ground for revoking a licence based on the past or present conduct provision of section 6(2)(d). Also, the Court rejects that the Registrar needs

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<sup>347</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc., 2012 ONSC 2484 (CanLII April 24, 2012).

<sup>348</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013).

<sup>349</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 9 - 12. The test is provided for in section 6(2)(d) of the ‘Liquor Licence Act, RSO 1990, c L.19’, 1990.

<sup>350</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 9 - 12.

<sup>351</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 10.

<sup>352</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 12 - 13.

<sup>353</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 13.

to prove criminal activity of the licensee or applicant, pointing out that the standard of proof is only reasonable ground to believe and that conduct that is not criminal may also provide the grounds for such reasonable ground to believe.<sup>354</sup> Furthermore, the Court of Appeal seems to invite the Board to evaluate if a membership in a criminal organization establishes “. . . reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty;”<sup>355</sup> under the court’s guidance of the required standard of proof and the appropriate interpretation of the legislative test.<sup>356</sup>

Mr. Barletta appealed the ruling to the Supreme Court of Canada, who dismissed the appeal.<sup>357</sup> Consequently, the Ontario’s Licence Appeal Tribunal issued a decision on October 6th 2014, where Mr. Barletta’s liquor licence was revoked.<sup>358</sup> The tribunal found that Mr. Barletta’s membership in the Hells Angel’s MC, found to be a criminal organization, provided grounds for revoking his licence.<sup>359</sup> Finding his devotion to the club and it rules, requiring him to put the interests of the club above everything else, established reasonable grounds to belief that he will not carry on business in accordance with law and with integrity and honesty. Mr. Barletta appealed the decision of the Ontario’s Licence Appeal Tribunal to the Ontario Superior Court of Justice Divisional Court, which dismissed the appeal after a hearing.<sup>360</sup>

Mr. Barletta’s case suggests that authorities in Canada can reject liquor license to individuals on grounds of their membership in criminal organization such as the Hells Angels MC, as providing grounds to believe that an individual “. . . will not carry on business in accordance with the law and with integrity and honesty;”<sup>361</sup>.

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<sup>354</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 11.

<sup>355</sup> *Liquor Licence Act*, RSO 1990, c L.19

<sup>356</sup> Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at p 8 - 9 and 12 - 13.

<sup>357</sup> *751809 Ontario Inc. (Famous Flesh Gordon's) v. Registrar, Alcohol and Gaming Commission of Ontario*, 2014 (SCC) 1204 (CanLII January 16, 2014)

<sup>358</sup> *8668 v. (Famous Flesh Gordon's) v. Registrar of Alcohol and Gaming*, 2014 (ON LAT) 60751 (CanLII October 6, 2014); Richmond, Randy, ‘Former Hells Angels president in London has liquor licence revoked in a ruling that could be applied to other outlaw bikers ’ (London Free Press, October 16, 2014)

<sup>359</sup> *8668 v. (Famous Flesh Gordon's) v. Registrar of Alcohol and Gaming*, 2014 (ON LAT) 60751 (CanLII October 6, 2014), para 11 - 16.

<sup>360</sup> *751809 Ontario Inc. (Famous Flesh Gordon's) v. Registrar, Alcohol and Gaming Commission of Ontario*, 2014 (SCC) 1204 (CanLII January 16, 2014)

<sup>361</sup> ‘*Liquor Licence Act*, RSO 1990, c L.19; Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 (CanLII March 18, 2013), at s. 6(2)(d).

Considering affiliation with criminal organizations when making administrative decisions such as licenses applications should be seen as a mobilization of administrative law for countering organized crime. The efforts bear some similarities to the administrative approach in the Netherlands, discussed in the literature review chapter.<sup>362</sup>

### Summary of Non-Criminal Justice Responses found to be used in Canada

Authorities in Canada can detain an individual that arrives at its borders and find him inadmissible to Canada, on basis of his organized criminality. They are also able to deport a non-citizen that is within the borders on the same grounds, even if he is a permanent resident.

Such inadmissibility can be based on mere membership in organizations if the organization in question is involved in crimes<sup>363</sup> or, in the absence of such membership, on the grounds of participation and involvement in the activities of such organizations.<sup>364</sup> Also the standard of proof for finding inadmissibility on grounds of organized criminality is “reasonable grounds to believe” and not the criminal standard of proof beyond reasonable doubt.<sup>365</sup>

Additionally the police in Canada are able to and use Check Stops based on the Highway Traffic Act for the purpose of stopping groups considered to be involved in organized crime, where the selected group being stopped pose genuine highway security concerns. At a Check Stops the police can then seize the opportunity to pursue other lawful and proper purposes within their sphere of duty, such as intelligence gathering related to organized crime or crime in general. These other purposes can however not cause more interference to the detained person than needs be for the purpose of the highway traffic security concerns.

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<sup>362</sup> See for example: Fijnaut, Cyrille, ‘The administrative approach to organised crime in Amsterdam: Background and developments’ in Cyrille Fijnaut (ed), *The administrative approach to (organised) crime in Amsterdam* (repository.uvt.nl 2002), 15. Nelen, Hans, and Wim Huisman, ‘Breaking the Power of Organized Crime? The Administrative Approach in Amsterdam’ in Frank Bovenkerk and others (eds), *Studies in Organized Crime*, vol. 7 (Springer New York 2008), 207.

<sup>363</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012.. ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’.

<sup>364</sup> ‘Canada (Minister of Citizenship and Immigration) v. Thanaratnam, 2005 FCA 122 (CanLII)’, at para 31 - 37.

<sup>365</sup> ‘Stables v. Canada (Citizenship and Immigration)’, 2011 FC 1319 (CanLII), <<http://canlii.ca/t/fp0km>> Accessed on 10 July 2012.. ‘Collins v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 87292 (IRB)’.

‘Canada (Minister of Citizenship and Immigration) v. Thanaratnam, 2005 FCA 122 (CanLII)’, at para 31 - 37. See on Standard of proof: ‘Canada (Public Safety and Emergency Preparedness) v. Stables’, 2010 CanLII 96602 (IRB), <<http://canlii.ca/t/fpt1z>> Accessed on 3 July 2012, para 12. Also as cited in *Canada v Stables* [2010]: ‘Chiau v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 9042 (FC)’ (CanLII 3 February 1998), page 3.

Finally Canadian authorities seem to be utilizing an administrative approach to counter organized crime. Safe Communities and Neighbourhoods legislations have been enacted to give municipal authorities powers to prevent properties within the municipal from being used by those considered to be involved in organized crime activities. Also, powers of the fire marshal and other municipal authorities seem to be used for similar preventive purposes. Finally, Canadian authorities can be seen to be introducing membership in criminal organizations as a consideration in administrative decision making such as public licensing. However, it should be noted here that the latter two examples of administrative approach to counter organized crime can not be seen to have been enacted with the intention of being utilized for countering organized crime.

## **Germany**

Germany is most noteworthy for the scope of this study for its efforts to ban criminal organizations. The only nation state known to this study to have banned Outlaw Motorcycle Clubs under civil law, on grounds of activity of it's members.

### Banning Associations

The first case where an organization, perceived to be a criminal organization, was banned as an effort to counter organized crime was the banning of the “Hells Angels MC Hamburg e.V.” by the Federal Minister of the Interior in 1983.<sup>366</sup> Followed by the banning of “MC Hells Angels Germany Chapter Düsseldorf” by the Ministry of the Interior of the State of North Rhine-Westphalia in 2000.<sup>367</sup> Since then media coverage shows that German authorities have continued to ban motorcycle clubs that they claim to be involved in criminal activity and

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<sup>366</sup> Bundesministerium des Innern (the Federal Ministry of the Interior) decision from 21 October 1983 file reference S 1-619 313/13.

<sup>367</sup> Ministerium für Inneres des Landes Nordrhein-Westfalen (Minister of the Interior of the State of the Northern Rhine-Westphalia) decision from 11 December 2000, file reference IV A 3 - 2205

organized crime, predominantly clubs that are part of the Hells Angels MC or the Bandidos MC.<sup>368</sup>

Both the Hells Angels MC and the Bandidos MC are considered to be outlaw motorcycle gangs. At the annual meeting of the 16 Ministers of Interior and the Federal Minister of Interior in May 2010, the Ministers of Interior reached a consensus of a nation wide ban on the Hells Angels MC and the Bandidos MC.<sup>369</sup> At the time this is written it seems that such a nation wide ban has not yet been put in place.

German authorities have banned the clubs under article 9 of the Basic Law (the German constitution). Article 9 protects the freedom of association and outlines the restrictions to that same right. The second paragraph of article 9 prohibits associations that have aims contrary to the criminal law, or who's activities are such as to contravene the criminal code. The provision says: "Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited."<sup>370</sup>

Based on article 9 of the Basic Law, article 3 of the Association Act (the Act Regulating Public Association from 5 August 1964) authorizes to dissolve associations whose aims or activities are found to be contrary to the criminal law. Dissolving an association requires, according to article 3, an administrative decision of the ministry of interior, but the law provide for a judicial review of the decision.<sup>371</sup>

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<sup>368</sup> Hartman, Trinity, ed., 'Brandenburg bans motorcycle gang' (Deutsche Welle, August 27, 2009) <<http://www.dw.de/dw/article/0,,4598039,00.html>> accessed 22 November 2011,; Houlton, Susan, ed., 'Hell's Angels ride no more in German state' (Deutsche Welle, April 29, 2010) <<http://www.dw-world.de/dw/article/0,,5519489,00.html>> accessed 22 November 2011; Chelsom-Pil, Charlotte, 'Hell's Angels biker gangs shut down in Frankfurt' (Deutsche Welle, September 30, 2011) <<http://www.dw.de/dw/article/0,,15429845,00.html>> accessed 24 March 2012. Heine, Hannes, 'Rockers want to defend themselves against ban plans' (Der Tagesspiegel, December 11, 2011) <<http://www.tagesspiegel.de/berlin/hells-angels-kontra-rot-schwarz-rocker-wollen-sich-gegen-verbotsplaene-wehren/5945216.html>> accessed 15 May 2012

<sup>369</sup> Lichtenberg, Arne, 'German police target criminal biker gangs' (Deutsche Welle, April 26, 2012) <<http://www.dw.de/dw/article/0,,15912602,00.html>> accessed 15 May 2012.

<sup>370</sup> Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) from 23 May 1949 (BGBl. S. 1), art. 9 para 2.

<sup>371</sup> Gesetz zur Regelung des öffentlichen Vereinsrechts (The Association Act), from 5 August 1964 (Federal Law Gazette I, p 593), article 3.

The scope of the ban is wide as it also bans other organizations from continuing the efforts of the banned association and the forming of substitute or replacement organizations.<sup>372</sup> The Act furthermore allows for seizure and confiscation of properties of the banned association.<sup>373</sup>

The first ban was the Federal Minister of the Interior decision to dissolve the “Hells Angels MC Hamburge.V.” in 1983. The decision was appealed to the Federal Administrative Court. The appeal was brought forward on three separate grounds.

The first ground for appeal was lack of jurisdiction of the Federal Ministry of the Interior. Additionally, if the federal ministry had jurisdiction under the statute, such jurisdiction was claimed to be unconstitutional.

The court found the Federal Minister of the Interior to have jurisdiction, based on the court’s finding that the activity of the association extended beyond a single German Lander.<sup>374</sup> The court also found the jurisdiction to be constitutional, with reference to its previous case law.<sup>375</sup>

The second ground was that the banning order was unlawful, as the plaintiff had not been heard before it was made. The court found this not to make the banning order unlawful, citing the German Administrative Proceedings Act that a hearing can be dispensed of where immediate decision appears necessary in the public interest.<sup>376</sup>

The third ground for appeal was that the requirements for imposing the ban were not met. The plaintiffs argued that three requirements for the ban were not met. First, claiming that the criminal acts of the members were not based on the association’s objective and the acts did not constitute activities of the association. Second, that it should affect the decision of dissolving the

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<sup>372</sup> Gesetz zur Regelung des öffentlichen Vereinsrechts (The Association Act), from 5 August 1964 (Federal Law Gazette I, p 593), art. 8 para 1.

<sup>373</sup> Gesetz zur Regelung des öffentlichen Vereinsrechts (The Association Act), from 5 August 1964 (Federal Law Gazette I, p 593), art. 3 para 1 and art. 11.

<sup>374</sup> Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988, p 10 – 12.

<sup>375</sup> Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988, p12 and 13. Citing its case law: BVerwGE (Decisions of the Bundesverwaltungsgericht) 55, 175 <176>; 61, 218 <219>; judgment of 13 May 1986 – BVerwG 1 A 12.82 – Buchholz 402.45 VereinsG No 8.

<sup>376</sup> The German Administrative Proceedings Act (Verwaltungsverfahrensgesetz – VwVfG) Section 28 para 2 <<http://www.gesetze-im-internet.de/vwvfg/>> accessed 8 June 2012. As cited in: Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988, p 14 and 21.



association that the “Hells Angels MC Hamburge.V.” was not found to be a criminal association in the meaning of article 129 paragraph 1 in a recent criminal proceedings. Finally, no facts were claimed to support that the association had wanted to conceal offences committed by its members.

The court declared that the initiative of criminal proceedings is not required to establish that an association contravenes the criminal law for the purpose of banning it under article 9 paragraph 2 of the Basic Law. Also, the court notes how the banning offence of article 9 of the Basic Law was differently framed from Article 129 paragraph 1 of the German Criminal Code (Strafgesetzbuch - StGB).

Furthermore, the court explains the purpose of the banning offence, as not intended as an additional sanction for criminal acts of individual persons, but rather intended to:

“counteract a particular threat to public safety or order resulting from the founding or continuation of an organisation from which criminal acts are planned or committed. Such organisations constitute a particular threat to the legal interests protected by the criminal law. They have an inherent dynamic of their own and an organised potential in terms of resources and persons, which facilitate and favour criminal behaviour. At the same time, the individual member’s feeling of responsibility is frequently reduced, individual inhibitions about committing offences are destroyed and there is a stimulus to commit further offences.”<sup>377</sup>

The court acknowledged that legal interests of the community, protected by the criminal law, can be particularly threatened by organizations that contravene the criminal law.

The court found the “Hells Angels MC Hamburg e.V.” to be an association for the purpose of the banning provision, based *inter alia* on the fact of it being registered as such.<sup>378</sup>

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<sup>377</sup> Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988a, p 23.

<sup>378</sup> Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988, p 21.

The court proceeded by examining whether the criminal conducts of the members can be attributed to the association. The court explained that despite lack of criminal capacity, as only natural person have criminal capacity, associations can contravene the criminal law.<sup>379</sup> Furthermore, that through its members and the club officers, an association can form a group intent that is separate from that of the individual member. This group intent allows the association its own purpose and to act independently. The court acknowledged that an association could have more than one such purpose at the same time, legal, illegal or criminal. Also the court noted that criminality needs not to be the main purpose or activity of the association, nor does it have to be on a permanent basis.

The court made it clear that an association can be found unlawful, based on the acts of its members when they commit criminal acts spontaneously and based on their own decision.<sup>380</sup>

Such a finding could be based on acts of the members if they repeatedly act as unified association, so from the outside the criminal acts appear to be activities of the association and the association is aware of and approves this fact or at least accepts it without contradiction.<sup>381</sup> The court additionally noted that criminal behaviour on the part of the club members could also be attributed to the association if the association attempts to cover it up by offering the members its own assistance or assistance from other members.<sup>382</sup>

Interestingly, the court here found that the association can become accountable ‘after the fact’ by supporting activities of its members, without the association as such having initially participated in its commission or the decision to commit these acts. The court explained what constitutes such a support. Neither needs such support to be formally decided or directed at the commission of specific offences. Nor, is such support determined from a criminal law point of view, such as reference to participation or assistance in criminal acts.<sup>383</sup> The court stated that it is sufficient that it is made clear to the members or the public, especially to the victims of the offences, that the association will support its members in relation to the offences.<sup>384</sup>

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<sup>379</sup> Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988, p 21 - 22.

<sup>380</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 22.

<sup>381</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 22.

<sup>382</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 22.

<sup>383</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 23.

<sup>384</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 24.

After having explained in this way how an association can contravene the criminal law for the purpose of a ban under article 9 of the Basic Law, the court found the “Hells Angels MC Hamburg e.V.” to contravene the criminal law.<sup>385</sup>

The court accepts the purpose of the association as stated in the article of the association the ‘pursuit of the sport of motorcycling’.<sup>386</sup> However, the court claims there to be an additional objective of offering full supports to its members in their criminal offences.

The court notes that all and every member declares support and solidarity to all and every other member - support and solidarity that is also publicly declared and displayed. Due to this publicly declared support and solidarity, the court found non-members reasonably to think, that the acts of individual members would be supported by all the other members.<sup>387</sup> Furthermore the court found this to give the members confidence of the support of their fellow members for their acts, criminal or not. The court also noted that members of the association, by their violent behaviour, created a reputation for themselves as a violent group. This reputation was used effectively, by individual members in committing offences, where the reputation would intimidate non-members and ensure compliance.<sup>388</sup> The court found it clear that all the members of the “Hells Angels MC Hamburg e.V.” knew of the violent acts committed by members of the association as Hells Angels and the reputation the association acquired as a consequence of these acts.<sup>389</sup> The court found that the association did not try to counteract this reputation.<sup>390</sup> The court gives account of how members holding leading role within the association failed to condemn the violence and, in some cases, supported or lead the violent activity.<sup>391</sup>

Finally the court notes how the club had prepared a list of lawyers stating which lawyer was to represent which members when necessary; this the court found to be evidence of the members’ criminal defence being organized in advance.<sup>392</sup> Based on these findings, the court

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<sup>385</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 24.

<sup>386</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 23 - 24

<sup>387</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 25 - 28, 31

<sup>388</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 28, 30 - 36

<sup>389</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 35

<sup>390</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 29, 35 and 36

<sup>391</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 30 - 36

<sup>392</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 28

found that the association had supported the criminal activity of its members, which is sufficient on its own to constitute a banning offence.<sup>393</sup>

Consequently, the court finds the purpose and activities of the “Hells Angels MC Hamburg e.V.” to contravene the criminal law. Based on its finding that individual criminal offences of the members were seen, for external purposes, as activities of the “Hells Angels MC Hamburg e.V.” and accepted by the association. Additionally, based on the court’s finding that the association supported the criminal activity of its members.<sup>394</sup>

The court seems to agree with the Hamburg Landgericht judgment that it is not possible to establish that activities of the group were planned or that a group intent was formed.<sup>395</sup> However, this is not found to be necessary for a banning offence.

The court finds the ban to be in accordance with the principle of proportionality and finds no reason to take any less severe measure against the “Hells Angels MC Hamburg e.V.”<sup>396</sup>

The ban on the “Hells Angels MC Hamburg e.V.” is therefore upheld by the court.<sup>397</sup>

The second case examined was the decision by the Ministry of the Interior of the State of North Rhine-Westphalia to dissolve the “MC Hells Angels Germany Chapter Düsseldorf” in the year 2000.

The ministry, like the judge in the “Hells Angels MC Hamburg e.V.” case, finds the criminal activities to have been known, accepted and supported by the association.<sup>398</sup> Consequently the association is found to contravene the criminal law and banned.

However the ministry of the State of North Rhine-Westphalia reaches further than its federal counterpart in its decision, by claiming that offences were planned at the association’s

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<sup>393</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 28

<sup>394</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 28 and 37.

<sup>395</sup> The Hamburg Regional Court (Landgericht), (37) 17/84 Kls 2500 Js 5/84, p 211. As cited in: Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988, p 37 – 38.

<sup>396</sup> Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988, p 37.

<sup>397</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 36 - 37.

<sup>398</sup> Ministerium für Inneres des Landes Nordrhein-Westfalen (Minister of the Interior of the State of the Northern Rhine-Westphalia) decision from 11 December 2000, file reference IV A 3 - 2205, p 8 - 9.

meetings and qualify as organized crime.<sup>399</sup> This would suggest that a common intent was formed by the members and that the members, and others, committed offences on the organizations behalf.

The ministry claims these activities can only be prevented by banning the association and that lesser measures are insufficient.<sup>400</sup> The ministry argues that criminal activity is the main source of income for the association and therefore a ban on the activities of the association will not effectively change its objectives or prevent the criminal activities of the association or its members.

Furthermore, the ministry claims the expected criminal conviction of the association's leading members cannot be expected to become effective in changing the objective of the association or stop the illegal activity.<sup>401</sup> The ministry claims the way the association supports its incarcerated members as well as the support they get through connections with other Hells Angels chapters are the reasons for this assessment. This arrangement is said to allow incarcerated members to rely on the support of the association while they serve time in prison.<sup>402</sup> The ministry claims this support is financed by illegal activity and therefore the illegal activity will have to continue to maintain the support.<sup>403</sup>

### Summary of Non-Criminal Justice Responses found to be used in Germany

The only Non-Criminal Justice Response to organized crime in Germany that this study was able to find sufficient evidence for was the ban on organizations that contravene the criminal laws.

Under German law, organizations can contravene the criminal law, even though only natural persons can have criminal capacity.<sup>404</sup> However, criminal conducts of its members can

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<sup>399</sup> Ministerium für Inneres des Landes Nordrhein-Westfalen (Minister of the Interior of the State of the Northern Rhine-Westphalia) decision from 11 December 2000, file reference IV A 3 - 2205, p 6.

<sup>400</sup> Decision of The Ministry of the Interior of the State of North Rhine-Westphalia, Germany, from 11 December 2000, p 8.

<sup>401</sup> Ibid

<sup>402</sup> Ibid

<sup>403</sup> Ibid

<sup>404</sup> Bundesverwaltungsgericht (The Federal Administrative Court) case no BVerwG 1 A 89.83 judgment of October 18, 1988, p 21 - 22.

be contributed to the organization, allowing the organization to form purpose and act independently from its individual members.<sup>405</sup> Criminal conduct of members can be attributed to the organization if, from the outside, the criminal acts appear to be activities of the association and the association is aware of and approves this fact or at least accepts it without contradiction.<sup>406</sup> Also, criminal behaviour on the part of the club members can be attributed to the association if the association covers it up by offering the members its own assistance or assistance from other members.<sup>407</sup> Furthermore, criminality needs not to be the main purpose or the main activity of the association, nor does it have to be on a permanent basis.

The purpose of a ban is to prevent the “. . . threat to legal interests protected by the criminal law . . .”<sup>408</sup> posed by organizations that contravene the criminal law. The purpose is therefore not punitive and the ban is not intended to be an additional sanction for criminal acts of individual persons.

## **Iceland**

This study found two approaches to be utilized to counter organized crime in Iceland that are not based on criminal justice responses. The most frequently used measures are based on border control, where known members of alleged criminal organizations have been denied entry into Iceland, based on restrictions to their treaty based “right” of entry. Also, evidence were found of an administrative approach for disrupting activities of organizations considered to be involved in organized crime.

### Border control

Icelandic authorities stopped 19 individuals on its borders in 2002 based on their involvement with the Hells Angels MC. Eleven individuals were denied entry on the ground of their criminal record. The Directorate of Immigration decided the day after to deny the remaining eight individuals of entry, based on the Act on control of Foreigners No 45 from

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<sup>405</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 21 - 22.

<sup>406</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 22

<sup>407</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 22

<sup>408</sup> The Federal Administrative Court (*Bundesverwaltungsgericht*), Case no BVerwG 1 A 89.83, p 23

1965.<sup>409</sup> They were subsequently arrested and escorted by police back to Denmark from where they came.

Statements given by officials to the media, suggest that the involvement of these individuals with the Hells Angels MC association was a deciding factor. Stefán Eiríksson, then director at the Ministry of Justice, stated that Icelandic authorities intended to use all available measures to counter organized crime activities, including activities of the Hells Angels MC.<sup>410</sup> Sólveig Pétursdóttir, the Minister of Justice stated that there was a wide solidarity between administrative institutions in Iceland to fight organized crime activities with all available measures, including activities that thrive within the Hells Angels MC.<sup>411</sup> Haraldur Johannessen the National Commissioner of the Icelandic Police stated that the police considered the Hells Angels MC to be an organized criminal group and other members of the Hells Angels MC could expect similar measures to be taken.<sup>412</sup>

Similar measures were taken against members of the Hells Angels MC and their support clubs in November 2007 and March 2009.<sup>413</sup> Press releases show that these measures were intended to counter organized crime in Iceland.<sup>414</sup>

Iceland is a member of the Schengen treaty and the European Economic Area (EEA). The Schengen treaty abolished border control on the internal borders of the member states. The European Economic Area was established by an agreement that expands the four freedoms of the European Union – the free movement of goods, services, persons and capital - to the three member states of the European Free Trade Association (EFTA), that are not members of the

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<sup>409</sup> Morgunblaðið, 'Vítisenglar hafa áður sýnt áhuga á Íslandi' (The Hells Angels have previously shown interest in Iceland) *Morgunblaðið* (February 2, 2002).; Lög um eftirlit með útlendingum (Act on control of foreigners), no 96 from 12 May 1965, superseded 1 January 2003 <<http://www.althingi.is/lagas/125a/1965045.html>> accessed 8 August 2012, especially art. 10 - 12.

<sup>410</sup> Morgunblaðið, 'Vítisenglar hafa áður sýnt áhuga á Íslandi' (The Hells Angels have previously shown interest in Iceland) *Morgunblaðið* (February 2, 2002)

<sup>411</sup> Ibid

<sup>412</sup> Ibid

<sup>413</sup> National Commissioner of the Icelandic Police, 'Lögregluaðgerð vegna komu Hell's Angels til landsins' (Police actions on account of Hell's Angels arrival to Iceland) (*Lögregluvefurinn* (National Commissioner of the Icelandic Police, press release), November 2, 2007)

<[http://www.logreglan.is/subqa.asp?cat\\_id=81&module\\_id=220&element\\_id=10647](http://www.logreglan.is/subqa.asp?cat_id=81&module_id=220&element_id=10647)> accessed 23 April 2012;

National Commissioner of the Icelandic Police, 'Félögum í Hells Angels vísað frá í Keflavík' (*Lögregluvefurinn* (National Commissioner of the Icelandic Police, press release), March 6, 2009)

<[http://www.logreglan.is/displayer.asp?cat\\_id=81&module\\_id=220&element\\_id=13529](http://www.logreglan.is/displayer.asp?cat_id=81&module_id=220&element_id=13529)> accessed 18 June 2012

<sup>414</sup> Ibid

European Union.<sup>415</sup> Consequently, the EFTA member states are obligated to adapt their legislations to the European Union's legislations in these fields, to guarantee equal rights and obligations for citizens and economic operators in the European Economic Area.<sup>416</sup>

Consequently, the reintroduction of border control on Iceland's internal borders with the Schengen states and the denying of entry to Schengen citizens had to be in accordance with exceptions and limitations allowed for in the treaties of the Schengen and the European Economic Area.<sup>417</sup> In a notification to the European Commission in 2009, Iceland states that the border control is being reintroduced for reasons of "... specific threat to the public order and the national security of Iceland, ...".<sup>418</sup> The intended aim is declared to: "... prevent the entry of potentially defined group of dangerous persons from and via neighbouring European countries"<sup>419</sup>, the implementation of the border control shows that this defined group was the Hells Angels MC.<sup>420</sup>

The measures first received a judicial review in 2010 when Mr. Kristiansen and Mr. Wahl brought a civil case against Icelandic authorities based on the unlawfulness of their deportation, after having unsuccessfully appealed the decisions of the Directory of Immigration to the Ministry of the Interior.<sup>421</sup>

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<sup>415</sup> The EES is the European Economic Area, its member states are the EU's 27 member states along with Iceland, Lichtenstein, Norway and Switzerland. See: European Economic Area, official website <<http://www.efta.int/eea.aspx>> accessed 13 June 2013

<sup>416</sup> The European Free Trade Association, official website <<http://www.efta.int/eea/eea-agreement.aspx>>, accessed 13 June 2013

<sup>417</sup> Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1, para. 1, art. 23 and 25. Lög um útlendinga (Act on Foreigners), no. 96 from 15 April 2002 <<http://eng.innanrikisraduneyti.is/laws-and-regulations/english/foreigners/nr/105>> accessed 11 June 2012, art. 41 and 42. Decision of the EEA Joint Committee No 158/2007 on free movement of persons [2007] OJ L124/20

<sup>418</sup> The Icelandic Minister of Justice, 'Declaration pursuant to Chapter II of the Schengen Border Code', (The Icelandic Minister of Justice, March 4, 2009), p 2.

<sup>419</sup> The Icelandic Minister of Justice, 'Declaration pursuant to Chapter II of the Schengen Border Code', (The Icelandic Minister of Justice, March 4, 2009), p 2.

<sup>420</sup> Embassy of Iceland, Icelandic Mission to the European Union, 'Report of the Minister of Justice regarding the temporary reintroduction of border control at internal borders of Iceland' (April 21, 2009), dated 23 April 2009.

<sup>421</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 2. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 2.



The District Court of Reykjavík decided upon both cases and cleared Icelandic authorities of all claims.<sup>422</sup> These cases could have been appealed to the Supreme Court of Iceland, but they were not. The time frame for such appeals has expired and the court's rulings have therefore become final in these cases.

The European Court of Human Rights hears cases brought by individuals against its member states for alleged breach of the Convention. Iceland is a member state, applicants are, however, required to exhaust domestic remedies before bringing cases before the court; to fulfill this requirement an appeal to the Supreme Court had to be made.<sup>423</sup>

The facts of Mr. Kristiansen's and Mr. Wahl's cases are similar and the rulings by Reykjavík district court are almost identical, made by the same judge on the same day. This work will therefore discuss Mr. Kristiansen's case and only reflect briefly on few distinctive issues in Mr. Wahl's case.

The facts of the case are that customs authorities stopped Mr. Kristiansen when he arrived at the Icelandic borders from Norway on February 8th of 2010.<sup>424</sup> He refused to answer police questioning but dressed himself in a vest with the Hells Angels MC insignia. Mr. Furuholmen, Mr. Kristiansen's lawyer who accompanied him, informed that they were to meet an Icelandic lawyer Mr. Oddgeir Einarsson hdl., and that his client intended to leave the country the day after.

The National Commissioner of the Police made a risk assessment for Mr. Kristiansen's arrival on the day of his arrival. The assessment informs that an Icelandic motorcycle club, MC Iceland, had the status of a prospect club within the Hells Angels World association and that the club was seeking full membership.<sup>425</sup> The entry process of the Icelandic club is said to be under

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<sup>422</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010.

<sup>423</sup> See on the rule that domestic remedies must be exhausted: Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), para 1, art 35.

<sup>424</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 1.

<sup>425</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 2.

the Norwegian club's supervision and the assessment concludes that Mr. Kristiansen's arrival is related to this entry process, as he is thought to be the president of the Norwegian club.

The assessment claims that organized crime has increased everywhere where the Hells Angels have established themselves and the emerging of a club in Iceland creates a risk of increase in organized crime in Iceland and is, therefore, a threat to the society.<sup>426</sup> To become full members, the Icelandic club would have to show that their activity and organization is consistent with Hells Angels MC requirements. This would increase the risk that the Icelandic members take up methods and modus operandi of the foreign Hells Angels members, as might be required by the foreign members. A membership is additionally considered to constitute a formal cooperation between the domestic members with individuals, many of which are hardened, heavily organized and dangerous criminals. Reference is made to members of the Hells Angels MC in Denmark having participated in violent conflicts with migrant gangs and motorcycle gangs involved in organized crime.<sup>427</sup> These conflicts are considered to be largely over dominance of the narcotic market.

After receiving the risk assessment, the Directorate of Immigration decided on the same day to deny Mr. Kristiansen entry into Iceland. Entry was denied on the basis of Act on Foreigners, claiming necessity on grounds of public order and public safety, depending upon "if the foreign national exhibits conduct, or may be considered likely to engage in conduct, that involves a substantial and sufficiently serious threat to the fundamental attitudes of society."<sup>428</sup> The directorate relies here on legitimate limitation to the right to free movement of person within the EEA.<sup>429</sup>

The Reykjavík district court rules against Mr. Kristiansen who claimed the risk assessment of the National Commissioner of the Icelandic Police to be misleading, incorrect and

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<sup>426</sup> Ibid.

<sup>427</sup> Ibid.

<sup>428</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 2. See on the legal provision: Act on Foreigners no. 96/2002. Subsection c paragraph 1 of article 41 as referred to in the judgment; paragraph 1 of article 42 as referred to in subparagraph c; as well as paragraph 2 of article 42 for clarification. Act on Foreigners no 96/2002, para. 2, article 42.

<sup>429</sup> Lög um útlendinga (Act on Foreigners), no. 96 from 15 April 2002, art. 41 and 42. Decision of the EEA Joint Committee No 158/2007 on free movement of persons [2007] OJ L124/20; Decision of the EEA Joint Committee No 158/2007 on free movement of persons [2007] OJ L124/20, art 5 para 1 and art. 27, para 1 and 2.

lacking references for its sources. The court found the assessment to be sufficient, noting it to be based on confidential information from police authorities of the Nordic countries, public information, especially media coverage in the Nordic countries and reports from EUROPOL.<sup>430</sup> The court finds there to be no need to disclose the sources for the assessment and notes that there might be vested interests against publication of confidential information. The court found the National commissioner of the Icelandic Police to have legal competence to create risk assessments of this kind, finding the police to be the right authority to assess if circumstances required that a foreigner be denied entry.<sup>431</sup>

Furthermore the court finds the Directorate Of Immigration and the ministry to have the role to decide, based on that assessment, if legal requirements were sufficiently satisfied, but not to review the assessment made by the police.<sup>432</sup>

The court also finds against Mr. Kristiansen's complaint that his denial of entry to Iceland had not sufficient basis in law. The court finds that the domestic legislation affords authorities leeway for interpreting what constitutes public order and public security. Authorities would however have to interpret these concepts in accordance with objective arguments and the states obligations under the EEA treaty.<sup>433</sup> The court finds the right of citizens to move and reside freely within the European Union to have been provided for in Iceland by an amendment to the Act on Foreigners in 2008, in accordance with Iceland's obligations under the EEA treaty.<sup>434</sup>

The court finds therefore that Mr. Kristiansen's denial of entry is an exception from the main rule of free movement of persons within the EEA.<sup>435</sup> Finding such an exception has to be interpreted strictly and therefore this freedom can only be limited based on public order, public

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<sup>430</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 9.

<sup>431</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 9.

<sup>432</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 9.

<sup>433</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 10; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, para 1 art 27

<sup>434</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 10. See further on the Directive: Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. See on the changes made to the Icelandic Act on Foreigners: Lög um breyting á lögum um útlendinga (Law Amending the Icelandic Act on Foreigners) no 85 from 12 June 2008

See on how the EC Directive was adopted to the EEA treaty: Decision of the EEA Joint Committee No 158/2007 on free movement of persons [2007] OJ L124/20

<sup>435</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 10 and 11.

safety and public health.<sup>436</sup> It is noteworthy that the court refers to the legitimate aims for restrictions as listed in the EC directive, but not the differently worded domestic legislation.<sup>437</sup>

The court notes how serious organized crime is considered to go against public interests and the security of the citizens.<sup>438</sup> The court notes the Hells Angels MC was assessed to be involved in organized crime and that authorities have countered them as such both domestically and abroad.<sup>439</sup> The court concludes that in the light of the nature of the Hells Angels MC and their involvement with criminal activity, their members have been assessed to be a threat to public order and public safety, and are therefore denied entry on the borders.<sup>440</sup>

Furthermore, Mr. Kristiansen claimed he had not been assessed individually as a person, based on his personal activity, as is required by the EC directive of free movement of persons from 2004. According to which, the denial of entry of an EES citizen requires personal conduct of the individual concerned to represent a genuine, present and sufficiently serious threat.<sup>441</sup> The directive specifically notes that justifications based of general prevention are not sufficient.

An important distinction has to be made here between Mr. Wahl's case and Mr. Kristiansen's case. Mr. Wahl claimed he arrived to Iceland as a tourist, for the purpose of sightseeing in Reykjavík and Icelandic nature, as well as intending to visit his friends in the Fáfñir association (later MC Iceland).<sup>442</sup> While Mr. Kristiansen claimed he arrived to Iceland to meet with an Icelandic lawyer about matters related to the Hells Angels MC and MC Iceland. However, the National Commissioner of the Icelandic Police found the arrival of both men to be interrelated to MC Iceland's entry process into the Hells Angels MC.<sup>443</sup>

The court finds the involvement of each man with the Hells Angels MC to entail their participation in the association's activity, and finds that with their membership and participation,

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<sup>436</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 10 and 11.

<sup>437</sup> Lög um útlendinga (Act on Foreigners), no. 96 from 15 April 2002, subpara c, para 1 art 41 and para 1 art 42. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, para 1 art 27

<sup>438</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11.

<sup>439</sup> Ibid.

<sup>440</sup> Ibid.

<sup>441</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11. Further on the directive see: Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, article 27.

<sup>442</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 1.

<sup>443</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 1 - 2. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 2

they have taken up the position of supporting the activities and aims of the association.<sup>444</sup> Here the court seems to be making a reference to the European Court of Justice decision in the *Van Duyn* case.<sup>445</sup> There, the court found that while one's involvement in an organization did not in and of itself establish that a person is more or less likely to engage in some specific conduct, it still was a factor that domestic authorities were entitled to take into account.

The court found that both visits would have been instrumental to facilitate the entry of MC Iceland into the Hells Angels MC, increasing the association's presence in Iceland and increasing the risk of organized crime. Based on this assessment the court concluded the arrival of both men to have generated a genuine and serious threat to public order and public security.<sup>446</sup>

The court does not give clear guidance as to what would be sufficient connection to the Hells Angels MC or MC Iceland. Arguably, membership in the Hells Angels MC is sufficient for denial of entry on the borders. This assumption is based on the court's finding that membership establishes participation in the association's activities and consequently the individual has taken the position of supporting the activities and aims of the association.<sup>447</sup> Furthermore the court states: "In the light of the nature of the Hells Angels MC and their linkage with criminal activity the members of the association have been assessed to be a threat to public order and public security and hence have been denied entry on the borders."<sup>448</sup> The threat they are found to pose is based on the risk of them facilitating the increased presence of the Hells Angels MC and thereby increased risk of organized crime. No reference is made to the two men's own reputation or criminal record.

The Court rejects the interpretation maintained by the plaintiffs that denial of entry on the basis of public order and public security is not permitted unless the same measures could be

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<sup>444</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 10. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11.

<sup>445</sup> *Van Duyn v Home Office* [1974] Ch 358 (C-41/74) European Court of Justice, at para 17 - 18 and 24.

<sup>446</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 10. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11.

<sup>447</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 10. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11.

<sup>448</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 10. The author's own translation.

taken against an Icelandic citizen.<sup>449</sup> The Court notes that authorities can take various different measures against Icelandic citizens on grounds of threat to public peace and public order while as the Icelandic constitution bars deportation or denial of entry of Icelandic citizens.<sup>450</sup>

Therefore, the Court finds that denial of entry on the basis of public order and public security is permitted under the Act on Foreigners although the same measure cannot be taken against an Icelandic citizen. This is again in line with the *Van Duyn* judgment that found domestic authorities entitled to put restrictions on foreign nationals even where the state did not put similar restrictions on its own nationals.<sup>451</sup>

In the case of *Van Duyn*, the European Court of Justice notes the principle of freedom of movement within the European Economic Community without any discrimination on grounds of nationality, to be a fundamental principle.<sup>452</sup> The court, however, notes that there are particular circumstances that justify measures to be taken on the ground of public policy for limitation of this freedom. The court also recognizes that the domestic public policy may vary between the member states and between periods of time.<sup>453</sup> The court therefore reserves an area of discretion for the authorities of the member states within the limitations imposed by the Treaty.

Subsequently the European Court of Justice finds that “. . . the Member State cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances.”<sup>454</sup> Finding this conclusion to flow from its arguments “. . . where the competent authorities of a Member State have clearly defined their standpoint as regards the activities of a particular organization and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, . . .”<sup>455</sup> Finally, the court finds that a member state can, for reasons of public policy, restrict freedom of movement based on individuals association with an organization even though that state does not place similar restriction upon its own nationals with regards to the same

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<sup>449</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 10. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11.

<sup>450</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 10. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11. See for the constitutional provision: Stjórnarskrá Lýðveldissins Íslands (The Constitution of the Republic of Iceland) no 33 from 17 June 1944), para 2 art 66.

<sup>451</sup> *Van Duyn v Home Office* [1974] Ch 358 (C-41/74) European Court of Justice, at para 20 - 23.

<sup>452</sup> *Van Duyn v Home Office* [1974] Ch 358 (C-41/74) European Court of Justice, at para 18. The European Economic Community (EEC) became the European Union (EU) in 1993.

<sup>453</sup> *Van Duyn v Home Office* [1974] Ch 358 (C-41/74) European Court of Justice, at para 18.

<sup>454</sup> *Van Duyn v Home Office* [1974] Ch 358 (C-41/74) European Court of Justice, at para 19.

<sup>455</sup> *Van Duyn v Home Office* [1974] Ch 358 (C-41/74) European Court of Justice, at para 19.

organization.<sup>456</sup> Where the state considers the activities of the organization to be socially harmful even if the activities of the organization are not unlawful.

Icelandic authorities can therefore deny foreigners of entry on the borders if it is deemed necessary for public order or public safety. On this basis, members of organizations found to be involved in organized crime have been denied of entry on the borders, as they were considered to increase the risk of organized crime and thereby being a genuine and serious threat to public order and public security.

### Administrative approach

#### *Attempts to Close Club Houses*

This study found Icelandic authorities to be using an administrative approach to counter organized crime. A statement from the police shows that after the police raided the clubhouse of Fáfnir, as part of a criminal investigation in 2007, they summoned different city and state authorities to inspect the building.<sup>457</sup> These authorities included the fire department, building inspector, electricity inspector and health authorities. The study was unable to verify the response of these authorities, but shortly thereafter the club moved out of the facilities they then occupied in downtown Reykjavík (the capital of Iceland). Fáfnir has since become MC Iceland, a prospect club of the Hells Angels MC, and later a full patched club of the Hells Angels MC. Over a period of less than ten years the club has relocated at least three times, and been located in three different municipals.<sup>458</sup>

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<sup>456</sup> Van Duyn v Home Office [1974] Ch 358 (C-41/74) European Court of Justice, at para 23 and 24.

<sup>457</sup> National Commissioner of the Icelandic Police, 'Lögregluaðgerð vegna komu Hell's Angels til landsins' (Police actions on account of Hell's Angels arrival to Iceland) (*Lögregluvefurinn* (National Commissioner of the Icelandic Police, press release), November 2, 2007)

<[http://www.logreglan.is/subqa.asp?cat\\_id=81&module\\_id=220&element\\_id=10647](http://www.logreglan.is/subqa.asp?cat_id=81&module_id=220&element_id=10647)> accessed 23 April 2012

<sup>458</sup> National Commissioner of the Icelandic Police, 'Lögregluaðgerð vegna komu Hell's Angels til landsins' (Police actions on account of Hell's Angels arrival to Iceland) (*Lögregluvefurinn* (National Commissioner of the Icelandic Police, press release), November 2, 2007)

<[http://www.logreglan.is/subqa.asp?cat\\_id=81&module\\_id=220&element\\_id=10647](http://www.logreglan.is/subqa.asp?cat_id=81&module_id=220&element_id=10647)> accessed 23 April 2012; Mbl.is, 'Vítisenglar á ólöglegum veitingastað' (Mbl.is, February 9, 2013)

<[http://www.mbl.is/frettir/innlent/2013/02/09/vitisenglar\\_a\\_ologlegum\\_veitingastad/](http://www.mbl.is/frettir/innlent/2013/02/09/vitisenglar_a_ologlegum_veitingastad/)> accessed 14 June 2013

This seems to suggest that authorities in Iceland are using administrative powers in efforts to close the clubhouses of associations considered to be involved with organized crime.

### *Denial of Trademark Registration*

The Icelandic Patent office rejected in 2011 the application of the Hells Angels MC Iceland to register their trademark, both logo and name.<sup>459</sup> The rejection was based on legitimate limitations for registration under article 14 of the Icelandic Trade Mark Act no. 45/1997. Subparagraph 3 provided that: “if the mark is contrary to law or public order or likely to cause offence”<sup>460</sup>.

The reason given for the denial was that the mark is intended to stand for activity that was thought to be organized crime. The patent office stated that a recent judgement of the district court of Reykjavík revealed that the National Commissioner of the Icelandic Police considered the motorcycle association Hells Angels to be involved in organized crime, operating globally.<sup>461</sup> This assessment was supported by the assessment of EUROPOL that the Hells Angels MC falls within its definition of organized crime.

The patent office notes in its reasoning that organized crime is a social threat directed at public interests and public safety.<sup>462</sup> The Icelandic Patent Office has emphasized that the *travaux préparatoires* for the Trade Mark Act explains that the use of a mark, if not the mark itself, can be a reason for denial of registration. Consequently, the Patent office finds the law not to allow the registration of a Hells Angels MC Iceland’s trademark, as the activity the mark would stand for is thought to be organized crime.<sup>463</sup>

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<sup>459</sup> Icelandic Patent Office, ‘Vörumerkjaumsókn nr. 2539/2011, HELLS ANGELS MC ICELAND, (orð- og myndmerki)’ (Trademark application no 2539/2011, HELLS ANGELS MC ICELAND, (word and logo)) (Icelandic Patent Office, January 6, 2012)

<sup>460</sup> Trade Mark Act no. 45/1997, art. 14 para 1 subpara 3.

<sup>461</sup> Icelandic Patent Office, ‘Vörumerkjaumsókn nr. 2539/2011, HELLS ANGELS MC ICELAND, (orð- og myndmerki)’ (Trademark application no. 2539/2011, HELLS ANGELS MC ICELAND, (word and logo)) (Icelandic Patent Office, January 6, 2012) Referring to: Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010 from 22 December 2011 (Wahl, Jan Anfinn v the Icelandic state)

<sup>462</sup> Icelandic Patent Office, ‘Vörumerkjaumsókn nr. 2539/2011, HELLS ANGELS MC ICELAND, (orð- og myndmerki)’ (Trademark application no 2539/2011, HELLS ANGELS MC ICELAND, (word and logo)) (Icelandic Patent Office, October 18, 2012)

<sup>463</sup> Icelandic Patent Office, ‘Vörumerkjaumsókn nr. 2539/2011, HELLS ANGELS MC ICELAND, (orð- og myndmerki)’ (Trademark application no 2539/2011, HELLS ANGELS MC ICELAND, (word and logo)) (Icelandic Patent Office, October 18, 2012)



The attorney for the Hells Angels has twice requested for the decision to be reversed. The attorney argues that Hells Angels MC Iceland is not involved in organized crime and that evidence to the contrary is ill supported and in fact only based on police investigative evidence.<sup>464</sup> The attorney also argues that the association has a right to register its name and logo, just as its members have a constitutional right to associate in the association.<sup>465</sup>

The Icelandic Patent Office has at the time of writing still not given its answer to the Hells Angels MC Iceland's attorney's second request.<sup>466</sup>

### Summary of Non-Criminal Justice Responses found to be used in Iceland

Authorities in Iceland are denying members in associations found to be involved in organized crime from entering the country, as an effort to prevent organized crime activity. The denial is based on genuine and serious threat to public order and public security.

Authorities even restrict in this way the right to freedom of movement that citizens of the Schengen states enjoy within the Schengen area, based on these members being a genuine and serious threat to public order and public security. The assessment of the associations lies with the National Commissioner of the Police as the competent authority.

Authorities in Iceland can also be seen to be using Administrative measure to counter organized crime by taking evidence of organized criminality into consideration when making administrative decisions. This can be seen from the denial of registration of the name and insignia of the Hells Angels MC by the Icelandic Patent office, as well as from the use of municipal powers in efforts to prevent the use of properties for activities of associations considered to be involved in organized crime.

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<sup>464</sup> Icelandic Patent Office, 'Vörumerkjaumsókn nr. 2539/2011, HELLS ANGELS MC ICELAND, (orð- og myndmerki)' (Trademark application no. 2539/2011, HELLS ANGELS MC ICELAND, (word and logo)) (Icelandic Patent Office, August 22, 2012) 'Icelandic Patent Office, 'Vörumerkjaumsókn nr. 2539/2011, HELLS ANGELS MC ICELAND, (orð- og myndmerki)' (Trademark application no 2539/2011, HELLS ANGELS MC ICELAND, (word and logo)) (Icelandic Patent Office, October 30, 2012)

<sup>465</sup> Icelandic Patent Office, 'Vörumerkjaumsókn nr. 2539/2011, HELLS ANGELS MC ICELAND, (orð- og myndmerki)' (Trademark application no 2539/2011, HELLS ANGELS MC ICELAND, (word and logo)) (Icelandic Patent Office, August 22, 2012), p 2 – 3.

<sup>466</sup> As of June 2013

The use of non-criminal justice responses to counter criminal behaviour in general and organized crime in particular should be relevant to discussions in the field of Transnational Criminal Law. Indubitably, this should be relevant to the discussion if criminal law is suitable to counter collective behaviour such as organized crime. Also, the above described use of non-criminal justice responses to counter organized crime should make Boister's statement questionable that Transnational Criminal Law is a doctrinal match to Transnational Crime, based on how Boister excludes non-criminal justice responses from the field of Transnational Criminal Law.

Finally, the above coverage must raise the question whether transnational efforts to counter organized crime are promoting non-criminal justice responses to counter organize crime, and if not, should they be promoting them in the light of the criticism that the criminal justice responses meet? This will be researched in the next subchapter.

## Transnational promotion of non-criminal justice responses

The study has at this point confirmed the utilization of non-criminal justice responses by domestic authorities for the purpose of countering organized crime, beyond the approaches that focus at the proceeds of crime and crime related assets. The second phase of this research examined if such non-criminal justice responses are being promoted at the international level. To investigate if non-criminal justice responses are being promoted, the study continued by reviewing official documents from the European Union and the United Nations that have to do with cooperation in criminal matters. The documents were reviewed in search for evidence of promotion of non-criminal justice responses for countering organized crime, utilizing the understanding gained by the first phase of the research of what kind of non-criminal justice responses were used for this purposes by domestic authorities.

The search revealed no evidence of the United Nations promoting such non-criminal justice responses.

The European Union was found to be promoting a variety of non-criminal justice responses that have a different focus than the criminal asset approaches. The European Union is influencing the approach taken by its member states for countering organized crime, by promoting non-criminal justice responses. Additionally, not only is the European Union facilitating the sharing of information between its member states, but is in fact an important part of developing the non-criminal justice responses that are being promoted seems to take place at the transnational or even the supranational level within the Union.

Evidence for promotion of non-criminal justice responses by the European Union in it's policy was found as early as 1997. That year the Council of the European Communities promoted the utilization of preventive approach to counter organized crime, claiming prevention to be “. . . no less important than repression in any integrated approach to organized crime, to the extent that it aims at reducing the circumstances in which organized crime can operate.”<sup>467</sup>

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<sup>467</sup> Action plan to combat organized crime[1997] OJ C251/1, at p 2.

This was followed up by Council Resolution, ‘on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it’ in 1998.<sup>468</sup> In the resolution the Commission and Europol are given the task of making a proposal on how preventive measures could be promoted in future work at the European level and in particular in its legal instruments. More specifically these supranational bodies are invited to assess the most effective preventative measures, by which bodies and at what level, including to which extent these measures could be taken at the European Union level.

In ‘A European Union Strategy for the beginning of the new millennium’ from the year 2000 the European Union promotes a preventive and multidisciplinary approach to counter organized crime.<sup>469</sup> Ten years later in 2010, the roadmap for the European Union in the area of justice, freedom and security, the Stockholm Programme, promotes the use of an administrative approach to prevent and counter organized crime.<sup>470</sup> Furthermore, in its conclusion on setting the EU’s priorities for the fight against organised crime between 2011 and 2013, the Council appeals to its member states “. . . to actively use, in addition to the traditional criminal justice-based approach, alternative and complementary approaches and instruments to fight serious and organised crime”.<sup>471</sup> Finally, the Council adopted the same wording in ‘Council conclusions on setting the EU’s priorities for the fight against serious and organised crime between 2014 and 2017’, appealing again to its member states to actively use alternative and complementary approaches and instruments to fight serious and organised crime.<sup>472</sup>

Furthermore, the Council of the European Union in 2012 sent the Standing Committee on operational co-operation on internal security (COSI) “. . . a number of proposals and suggestions to take forward the multidisciplinary and administrative approach to combat organised crime”<sup>473</sup>.

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<sup>468</sup> Council Resolution on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it [1998] OJ C408/1

<sup>469</sup> The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, at p 9 - 10, 22 and 32 - 33.

<sup>470</sup> ‘European Union, European Commission, ‘Action Plan Implementing the Stockholm Programme’ (European Union, April 20, 2000), at p 33. The Stockholm Program [2010] OJ C115/1, p 20 – 21.

<sup>471</sup> Council of the European Union, General Secretariat, ‘Council conclusions on setting the EU’s priorities for the fight against serious and organised crime between 2014 and 2017’, (European Union, July 26, 2013), at p 4.

<sup>472</sup> Council of the European Union, General Secretariat, ‘Council conclusions on setting the EU’s priorities for the fight against serious and organised crime between 2014 and 2017’, (European Union, July 26, 2013), at p 7.

<sup>473</sup> European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012), at p 1.

Showing a political body of the Union to be directing a bureaucratic ‘expert’ body of the Union towards an emphasize on non-criminal justice responses.

A survey conducted by the Netherlands delegation to the European Union shows that the member states of the Union suggest and welcome facilitation, cooperation and guidance at the level of the European Union for countering organized crime by way of a Non-Criminal Justice approach.<sup>474</sup> Furthermore, the supranational bodies of the Union, such as Europol and Eurojust, are seen by the member states as suitable for playing a role in transnational cooperation for Non-Criminal Justice Response to organized crime.<sup>475</sup>

The survey reveals that the member states see the European Union to have an important role to play in sharing of information about and developing non-criminal justice responses to counter organized crime. The survey finds the member states to call for the union to contribute in three ways.<sup>476</sup> First, the member states request that the future policy of the Union facilitates international cooperation on “an integrated, non-penal administrative approach”<sup>477</sup>. Second, to facilitate the sharing of information about existing practices and experience. Finally, to provide a platform at the Union level where the member states can address “. . . proposals and initiatives with regard to the administrative approach to organised crime.”<sup>478</sup>

The above coverage shows how the European Union is promoting non-criminal justice responses in its policy.

The European Union has also taken active part in the selection and development of non-criminal justice responses to be implemented at the domestic level.

As early as in 2011 the European Union made a handbook describing good practices in administrative approach to countering organized crime. The Handbook is entitled:

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<sup>474</sup> European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012), at p 23 - 24.

<sup>475</sup> ‘A multidisciplinary and administrative approach to combating organised crime’ (Ministry of Justice DK 8 March 2012), at p 2 - 3. ‘A Multidisciplinary Approach to Organised Crime: Administrative Measures, Judicial Follow-up, and the Role of Eurojust’ (Council of the European Union 14 June 2012), at p 6, 9 and 11.

<sup>476</sup> European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012), at p 24 - 25.

<sup>477</sup> European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012), at p 24.

<sup>478</sup> European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012), at p 24.

“Complementary approaches and actions to prevent and combat organised crime – A collection of good practice examples from EU Member States”, frequently referred to as “The Hungarian Handbook”.<sup>479</sup> The Hungarian handbook is not a one-time compilation, the handbook is continuously upgraded and maintained by experts within domestic law enforcement agencies and Europol.<sup>480</sup>

Additionally, the European Union has provided two platforms where the Union and the member states can address existing and new non-criminal justice responses to counter organized crime.

An informal network group has been established under the Presidency of the Union, made up of one representative from each member state.<sup>481</sup> The network group’s mandate according to publicly available information is to promote administrative measures as an approach, as well as to share information about its use amongst the member states and encourage sharing of best practices.<sup>482</sup> The network is also intended to propose new initiatives in developing administrative measures and make suggestions to highest authorities in the European Union. The network will provide information and give advise to the Council of the Union on policy and the Standing Committee on Internal Security (COSI) on operational oriented proposals.<sup>483</sup> The Europol Platform for Experts, under Europol, is intended to support the

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<sup>479</sup> Hungarian delegation, ‘Complementary approaches and actions to prevent and combat organised crime’ (commonly referred to as ‘the Hungarian Handbook’) (European Union, May 30, 2011). The handbook is not publicly accessible, and request for access for the purposes of this study only resulted in access being granted to 5 of its 107 pages, consisting of Sándor Pintér’s forward to the handbook. See reference to the handbook in: ‘The Danish Ministry of Justice, A multidisciplinary and administrative approach to combating organised crime (The Danish Ministry of Justice, March 8, 2012), p 2.

<sup>480</sup> European Union, Presidency of the Council of the European Union, ‘Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward’ (European Union, December 6, 2011), at p. 4.

<sup>481</sup> European Union, Presidency of the Council of the European Union, ‘Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward’ (European Union, December 6, 2011), at p 3 - 6.

<sup>482</sup> European Union, Presidency of the Council of the European Union, ‘Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward’ (European Union, December 6, 2011), at p 4 - 5.

<sup>483</sup> European Union, Presidency of the Council of the European Union, ‘Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward’ (European Union, December 6, 2011), at p 5.

informal network group.<sup>484</sup> The platform for experts and the informal network seem to be intended to exchange information on each network's knowledge and suggestions.

The Europol Platform for Experts is intended to facilitate compilation of national legislations; examples of best practice in administrative approaches; and provide questions and answers for practical difficulties.<sup>485</sup> As well as facilitating focus groups on specific criminal activity; collaboration in the preparation of documents; and facilitating a contact point between those tasked with the administrative approaches in different countries. The Europol Platform for Experts is, by invitation only, secure virtual community of experts on law enforcement. The virtual platform offers variety of forums, some are made up of law enforcement officials only, but others also have members that are not law enforcement officials, such as experts from the private sector and the academia. The Europol Platform for Experts has a forum named "Administrative approaches to tackling organised crime".<sup>486</sup> It is, however, unclear what forums are for law enforcement officials only and which are open to external experts. It is however unclear if that forum or any of the others is closed to law enforcement officials, or open for external experts. Additionally, the variety of expertise having been gathered by the forum is unclear. Europol seems therefore to be reaching out for expert knowledge. However, it remains indeterminate to what extent this knowledge influences or guides the discussion and knowledge generation within Europol.

Additionally, the research conducted shows how the supranational bodies of the European Union actively engaged in the implementation of both criminal and non-criminal justice responses at the domestic level.<sup>487</sup>

Two cases, where known Hells Angels MC members were denied access on the borders, show that Icelandic authorities relied on Europol's criteria for assessing as to whether or not the

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<sup>484</sup> European Union, Presidency of the Council of the European Union, 'Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward' (European Union, December 6, 2011), at p 6.

<sup>485</sup> European Union, Presidency of the Council of the European Union, 'Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward' (European Union, December 6, 2011), at p 6.

<sup>486</sup> The EUROPOL, official website <<https://www.europol.europa.eu>> accessed 11 January 2012. See on the Europol Platform for Experts: under Europol Expertise, accessed 4 July 2014.

<sup>487</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010.

Hells Angels MC were involved in organized crime.<sup>488</sup> The use of Europol's definition is interesting, as the Icelandic Parliament had two years earlier for the first time defined criminal organization as part of its enactment that criminalized participation in organized crime.<sup>489</sup> Yet, the case makes no reference to this definition in the Criminal Code.

A reference to Europol's assessment of Hells Angels MC being a criminal organization is again made in a criminal case in Iceland from 2012, where a report from Europol was submitted titled: "Knowledge Report: The Hells Angels MC: A Criminal Organisation"<sup>490</sup>. In the testimony of an Icelandic police officer in the case Europol is said to have reached the conclusion that the Hells Angels MC were a criminal organization based on the criteria set by the European Union. The report is not accessible to the public and Europol denied the request for access for the purpose of this study.<sup>491</sup>

The report referred to in the 2012 criminal case is from February 2012 so it might not be the same report as referred to in the 2011 case. Still, both these cases show an example of supranational institution of the European Union, in this case Europol, to be directly involved in the implementation of a domestic responses by offering information, definition, methodology and assessment.

This study therefore claims, based on the above coverage, that an emerging or established transnational system of non-criminal justice responses is to be found within the European Union - one fully comparable to the system of Transnational Criminal Law in terms of its influence on domestic morality and substantive norms.

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<sup>488</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, at p 5 and 11. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, at p 5 and 8.

<sup>489</sup> Excerpts from the General Penal Code, Almenn Hegningarlög (General Penal Code) no 19 from 12 February 1940 (Articles 69 a-69 g, 100 a, 175 a and 264) <<http://eng.innanrikisraduneyti.is/laws-and-regulations/english/penal-code-and-punishment/nr/27244>> accessed 8 May 2012

<sup>490</sup> Reykjaness district court (Héraðsdómur Reykjaness) judgment no. S-215/2012, at p 9.

<sup>491</sup> Email from Mark Morbée at Europol to author (11 April 2012)



## **Compatibility of Promotion of Non-Criminal Justice Responses under International Law with Fundamental Principles of Law and Good Governance.**

This study intends next to examine if the promotion of non-criminal justice responses under International Law raises less concerns for incompatibility with fundamental principles of law and good governance than the system of Transnational Criminal Law currently does.

The study has already established that domestic authorities are utilizing a wide variety of non-criminal justice responses to counter organized crime. Additionally, some examples have been found of what kind of non-criminal justice responses domestic authorities are utilizing for counter organized crime, looking at outlaw motorcycle gangs as an example. Furthermore, the literature review chapter detailed some of the concerns and criticisms that have been raised with the utilization of non-criminal justice responses to counter criminal activity.

Finally, the study has shown how the European Union is promoting non-criminal justice responses as a complementary approach and specific responses as best practice amongst its member states. This promotion of the European Union is found to represent the promotion of non-criminal justice responses to counter organized crime under International Law. Consequently, the study shows International Law to be indirectly suppressing organized crime through domestic legislations outside the sphere of domestic criminal law.

The promotion of the European Union of non-criminal justice responses is therefore considered suitable for examining if the promotion of non-criminal justice responses under International Law raises less concerns for incompatibility with fundamental principles of law and good governance than the system of Transnational Criminal Law currently does.

The promotion of the European Union of non-criminal justice responses was tested against criteria of five issues that can be identified as important concerns previously raised with the globalization of crime control, notably by Boister and Parkin.<sup>492</sup> The five issues examined are: Justification for transnational response; legitimacy for the promotion; doctrinal weaknesses;

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<sup>492</sup> Boister, N, 'Transnational Criminal Law?' (2003) 14(5) *European Journal of International Law*, 953; Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] *CEPS Papers in Liberty and Security in Europe*

emphasize on compatibility with Human Rights and other fundamental principles of law;<sup>493</sup> and finally, the knowledge base of the transnationalization<sup>494</sup>.

At the offset it should be acknowledged that the restricted access to information about promotion of non-criminal justice responses by the European Union and the process for selection and development of non-criminal justice responses proved to be problematic for the examination.

## **Justification for transnational response**

The first part of the criteria examines if the transnationalization of non-criminal justice responses is a justifiable approach to the perceived social problem. The issue of lack of justification has been raised with the transnational criminalization under the system of Transnational Criminal Law.<sup>495</sup>

The promotion of non-criminal justice responses within the European Union is largely part of the same policy as promotes the system of Transnational Criminal Law within the Union and relies largely on the same justification.<sup>496</sup> The issue in this context is the appropriateness of transnational efforts, as opposed to solely domestic efforts for countering organized crime. The promotion of non-criminal justice responses under international law is seen to need a specific justification, justifying why the selection of approaches and responses of domestic authorities to domestic social problems should be governed at the international level.

Boister warned against using the system of Transnational Criminal Law to form transnational morality. He claims the system to lack holistic policy based on sound knowledge of the social construction of the transnational threats and the appropriateness of transnational penal response to these threats, based on scientific knowledge free from rhetoric.<sup>497</sup> Boister claims the assessment of the appropriateness of transnational promotion of the penal approach to require discussion of coherent principles about individual autonomy, welfare, harm and

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<sup>493</sup> Boister, N, "Transnational Criminal Law?" (2003) 14(5) European Journal of International Law, 953

<sup>494</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe

<sup>495</sup> Boister, N, "Transnational Criminal Law?" (2003) 14 European Journal of International Law, 953, at p 956 – 957.

<sup>496</sup> Action plan to combat organized crime[1997] OJ C251/1, at p 2; The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, at p 9 - 10, 22 and 32 - 33; The Stockholm Program [2010] OJ C115/1, p 20 – 21.

<sup>497</sup> Boister, N, "Transnational Criminal Law?" (2003) 14 European Journal of International Law, 953, at p 957.

minimalism, justifying or constraining the criminalization. He claims the establishment of the system of Transnational Criminal Law to fail in discussing these coherent principles.

Additionally, Boister claims transnational criminalization to rest upon, “. . . assumptions about the legitimate political, social and economic interests of states, and assertions about the harm caused to these interests by the conduct criminalized”<sup>498</sup>, while claiming the question to be largely absent, as to whether there would be any direct harm to individuals.

The European Union’s involvement in countering organized crime is mainly justified by the rationale that organized crime is on the rise within the union and is increasingly costly to the society.<sup>499</sup> Also, that crime are increasingly being organized and committed across borders, while law enforcement authorities remain for the most part restricted to operating within the borders of nation states, making transnational response necessary.<sup>500</sup>

Unfortunately however, the claim for organized crime being on the rise is mainly established with reference to assessments made by Europol, assessments that have and continues to be criticized, by the academic community, *inter alia* for being methodologically flawed and for lacking definition of core terms such as organized crime, risk, etc.<sup>501</sup> Scholarly writings have emphasized the need for a scientifically sound risk assessment to decide, and clearly state, the risk being assessed, in terms of what harm is being posed by what threat.<sup>502</sup> For such an assessment it would have to be decided, for example, whether to assess either the risk of violence

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<sup>498</sup> Ibid

<sup>499</sup> The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, at p 3; Action plan to combat organized crime[1997] OJ C251/1, Part I, Chapter I, art 1.

<sup>500</sup> Action plan to combat organized crime[1997] OJ C251/1, Part I, Chapter I, art 1.

<sup>501</sup> See on the reliance on the assessments of Europol: The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, at p 3. Van Duyne, Petrus C, ‘OCTA 2006: the unfulfilled promise’ (2007) 10 Trends in Organized Crime, 120; European Parliament resolution of 25 October 2011 on organised crime in the European Union [2013] OJ C131 E/66, at p 67; Council of the European Union, General Secretariat, ‘Council conclusions on setting the EU’s priorities for the fight against serious and organised crime between 2014 and 2017’, (European Union, July 26, 2013), at p 4.

See on the criticism: Zoutendijk, Andries Johannes, ‘Organised crime threat assessments: a critical review’ (2010) 54 American Journal of Criminal Justice, 63; Van Duyne, P C, and T Vander Beken, ‘The incantations of the EU organised crime policy making’ (2008) 51 American Journal of Criminal Justice, 261. Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010), at p 36 - 37.

<sup>502</sup> Zoutendijk, Andries Johannes, ‘Organised crime threat assessments: a critical review’ (2010) 54 American Journal of Criminal Justice, 63. Van Duyne, Petrus C, ‘Organised Crime (Threat) as a Policy Challenge: a Tautology’ (2010) 12 Journal of Criminal Justice and Security, 355. Beken, Tom Vander, ‘Risky business: A risk-based methodology to measure organized crime’ (2004) 41 Crime, Law and Social Change, 471.

or of monetary loss. Such decisions having to be made in order to avoid other normative decisions such as whether violence or corruption creates more risk.<sup>503</sup> The same scholarly discussion has shown that risk assessment for organized crime suffers from imperfect information about organized crime, caused inter alia by the lack of consensus for definition - or even common understanding - of what constitutes organized crime.<sup>504</sup> That is not to deny the existence or extent of the threat but to point out the important fact that currently ‘knowledge’ of the perceived threat has a poor evidential basis, affecting the justification for a transnational response and selection of approaches and responses.

The European Parliament reflected upon the justification for specific efforts to counter organized crime in its Resolution on organised crime in the European Union in 2011, stating that:

“... organised crime has a substantial social cost, in that it violates human rights, undermines democratic principles, diverts and wastes financial, human and other resources, distorting the free internal market, contaminating businesses and legitimate economic activities, encouraging corruption and polluting and destroying the environment;”<sup>505</sup>

The European Union has ranked organized crime to be among the biggest threats to internal security of the union and its citizens, frequently placing organized and serious crime side by side with terrorism in this context.<sup>506</sup> The Union has stated that this threat will only be adequately dealt with by a joint effort of its member states and the union itself. “This calls for a dynamic and coordinated response by all member states, a response that not only takes into account national strategies but also seeks to become an integrated and multidisciplinary European strategy.”<sup>507</sup>

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<sup>503</sup> Zoutendijk, Andries Johannes, ‘Organised crime threat assessments: a critical review’ (2010) 54 American Journal of Criminal Justice, 63, at p 84.

<sup>504</sup> Beken, Tom Vander, ‘Risky business: A risk-based methodology to measure organized crime’ (2004) 41 Crime, Law and Social Change, 471. Zoutendijk, Andries Johannes, ‘Organised crime threat assessments: a critical review’ (2010) 54 American Journal of Criminal Justice, 63.

<sup>505</sup> European Parliament resolution of 25 October 2011 on organised crime in the European Union [2013] OJ C131 E/66, at p 70.

<sup>506</sup> European Parliament resolution of 25 October 2011 on organised crime in the European Union [2013] OJ C131 E/66, at p 70 and 72. Council of the European Union, General Secretariat, ‘Internal security strategy for the European Union’ (Publications Office of the European Union March 2010)

<sup>507</sup> The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, at p 3.

It is therefore unsettling in this context, that at a meeting of the Civil Liberties, Justice and Home Affairs Committee of the European Parliament - with Rob Wainwright, Director of Europol, and Martin Power, Chair, Standing Committee on Operational Cooperation on Internal Security - committee members saw reasons to discuss “. . . the need to develop better the definitions in relation to organised crime, . . .”<sup>508</sup> Further, the Commission of the European Communities has recognized in its communication to the Council and the European Parliament how the difficulties in defining ‘criminal organisation’ have a bad impact on efforts for countering organized crime.<sup>509</sup> This apparent difficulty in defining organized crime is not surprising in the light of Calderoni’s finding that “. . . a common understanding of the concept of criminal organization is lacking . . .”<sup>510</sup> amongst the member states of the European Union.

From early on the European Union has promoted the use of non-criminal justice responses based on the experience of its member states.<sup>511</sup> Reference has been made to how member states have had good experience with utilization of non-criminal justice responses, but no empirical evidence have been cited for this, nor has it been explained how the assessment was conducted.<sup>512</sup> Scholars have, however, claimed that political interests and particular incidents, more than scientific research, have driven domestic organized crime legislations.<sup>513</sup> Additionally, research has found the policymaking of the European Union in the field of criminal matters to be based on less than sound knowledge.<sup>514</sup>

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<sup>508</sup> European Union, General Secretariat of the Council of the European Union, ‘Summary of the meeting of the Civil Liberties, Justice and Home Affairs Committee of the European Parliament’ (European Union, March 26, 2013), at p 8.

<sup>509</sup> European Union, Commission of the European Communities, ‘Developing a strategic concept on tackling organised crime’ (European Union, June 2, 2005)

<sup>510</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 120.

<sup>511</sup> Council Resolution on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it [1998] OJ C408/1, at p 4.

<sup>512</sup> The Council of the European Union, the Netherlands delegation, ‘Analysis Administrative/Non-Penal Instruments in various Member States & Proposal Future Steps’ (The European Union February 25, 2010), at p 17; *The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium* [2000] OJ C124/1, at p 9.

<sup>513</sup> Boister, N, ‘“Transnational Criminal Law”?’ (2003) 14 *European Journal of International Law*, 953, at p 957; Stuart, Donald, ‘Politically Expedient but Potentially Unjust Criminal Legislation against Gangs’ (1998) 69 *International Review of Penal Law* 245, at p 246. As cited in: Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), at p 295.

<sup>514</sup> Parkin, Joanna, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] *CEPS Papers in Liberty and Security in Europe*, 1; Boswell, Christina, ‘The political functions of expert knowledge: knowledge and legitimization in European Union immigration policy’ (2008) 15 *Journal of European Public Policy*, 471.

Still, the European Union has seen it as its role to facilitate information sharing of existing responses and experience, on the union level, encouraging member states to introduce responses in line with a selection of existing practices of its member states.<sup>515</sup> Furthermore, the Union has considered its supranational institutions best fit to collect existing experience in this field, and assess what practices should be promoted as best practice.<sup>516</sup>

The social problem perceived to be organized crime requiring specific legal remedies has not been shown to be the same or similar social problems between the member states. Lack of consensus about what are the constitutive characteristics suggest also a lack of consensus about what are the characteristics of organized crime that justify specific legal remedies.<sup>517</sup> It seems questionable to introduce harmonized regional response to an unknown variety of marginally different social problems.

The same reasoning raises important doubt about the promotion of a particular domestic responses in one member state as best practice, suggesting that other member states should model their responses on this best practice.<sup>518</sup> The social problem perceived to be organized crime might be different between the member states. Additionally, the response is not guaranteed to have the same legal and social impact in different social, cultural, historical, economic and legal context.<sup>519</sup>

The above reasoning brings about Boister's concern for forming transnational morality by way of using the system of Transnational Criminal Law.<sup>520</sup> The union is 'appealing' to its member states, as part of the policy for joint efforts of the member states, to adopt non-criminal

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<sup>515</sup> The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1. Council of the European Union, General Secretariat, 'Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017', (European Union, July 26, 2013), at p 7.

<sup>516</sup> Council Resolution on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it [1998] OJ C408/1, at p 4.

<sup>517</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010).

<sup>518</sup> Hungarian delegation, 'Complementary approaches and actions to prevent and combat organised crime' (commonly referred to as 'the Hungarian Handbook') (European Union, May 30, 2011)

<sup>519</sup> Zumbansen, Peer, 'Transnational comparisons: theory and practice of comparative law as a critique of global governance' in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186; Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 *Global Constitutionalism*, 16.

<sup>520</sup> Boister, N, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law*, 953, at p 957.

justice responses to behaviour that the union is describing in its definition of organized crime.<sup>521</sup> Consequently, the Union can be argued to be creating transnational morality. However the following subchapter about legitimacy suggests that the Union lacks democratic legitimacy to do so.

Finally, a major justification for the involvement of the European Union in the promotion of non-criminal justice responses and development of responses is its Union wide knowledge and unique ability to create further such knowledge. However, the following subchapter about the knowledge base of the promotion of non-criminal justice responses raises important concerns about the soundness of the knowledge generated by the Union within the field.<sup>522</sup>

The appropriateness of the European Union's involvement in the promotion of non-criminal justice response to organized crime seems therefore to have questionable justifications. This is not to say that the transnational efforts to counter organized crime can not be justified. Rather the above examination portrays how the appropriateness of the transnational efforts has been poorly justified and how the current initiative needs to be amended in order to become justifiable.

## **Legitimacy**

The second part of the criteria is to examine the legitimacy for the transnationalization of non-criminal justice responses. This requires to examine the legitimate authorization behind the actions taken for the transnationalization of non-criminal justice responses.

Legal authorization within the European Union and its member states is governed by democratic form of governance.<sup>523</sup> The treaty on the European Union states that the Union is “. . . founded on the values of respect for human dignity, freedom, democracy, equality, the rule of

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<sup>521</sup> Council of the European Union, General Secretariat, ‘Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017’, (European Union, July 26, 2013), at p 7; The Stockholm Program [2010] OJ C115/1, at p 20.

<sup>522</sup> Parkin, Joanna, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] CEPS Papers in Liberty and Security in Europe.

<sup>523</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, at p 15 and 17, and art. 2; ECHR, Preamble, at p 5.

law and respect for human rights, . . .”<sup>524</sup> For the present purposes it is not necessary to provide a comprehensive review of the political and ideological literature that the discussion about democracy has generated, as the term ‘democracy’ is contested as well as the notion of what constitutes this form of governance. A more general account is deemed sufficient.

Democracy is generally perceived to be a form of governance where state power is vested in the ‘demos’ (the general public), where the demos are involved in decision making of the state, generally through some system of voting.<sup>525</sup> Democracy is generally perceived of as being participatory, consultative, transparent and publicly accountable, resting in one way or another on the consent of the governed.<sup>526</sup> Rule of Law is generally considered to be an inherent part of democracy.<sup>527</sup> The ‘Rule of Law’ is associated with the notion that authorities just as well as the people should be governed by law and limited in their action by the same law.<sup>528</sup> The law being laid down beforehand, make it possible for the individual to plan their affairs in accordance with knowledge of what is allowed in the society and the foreseeable actions of authorities.<sup>529</sup>

The treaty on the European Union describes the decision makers of the Union to be democratically accountable either directly to the citizens of the Union at the Union level, or in case of representatives of the member states in the European Council to the citizens of the relevant nation state or to the national Parliament.<sup>530</sup>

Transparency is ensured under Article 10 that requires the Union to make decisions to be taken as openly and as closely to the citizen as possible, ensuring the citizen’s right to

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<sup>524</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, title, I, art. 2.

<sup>525</sup> Oxford English Dictionary <<http://www.oed.com.ezproxy.library.yorku.ca/view/Entry/49758>> accessed 26 June 2014; Sheptycki, James W E, ‘Law Enforcement, Justice and Democracy in the Transnational Arena: Reflections on the War on Drugs’ (1996) 24(1) International Journal of the Sociology of Law, 61, at p 63 - 64. See generally on Democracy: Dahl, Robert Alan, Ian Shapiro, and José Antônio Cheibub, *The Democracy Sourcebook* (MIT Press 2003); Dahl, Robert Alan, *On Democracy* (Yale University Press 2000)

<sup>526</sup> Scholte, Jan Aart, ‘Civil Society and Democracy in Global Governance’ (2002) 8 Global Governance, 281, at p 285.

<sup>527</sup> Rosenfeld, Michel, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2000) 74 Southern California Law Review, 1307, at p 1307.

<sup>528</sup> Raz, Joseph, ‘The Rule of Law and its Virtue’ in Joseph Raz (ed) *The authority of law: Essays on law and Morality* (Oxford Scholarship Online 2012), at p 212 - 224,

<sup>529</sup> Hayek, Friedrich A, *The Road to Serfdom: with The Intellectuals and Socialism* (The Institute of Economic Affairs 2005), at p 57.

<sup>530</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, title II, art 10, para 2.



democratic participation.<sup>531</sup> Without transparency, the citizens would not be able to participate in the democratic governance of the Union, as they would not be able to make informed decisions when choosing representatives or keeping representatives democratically accountable.

‘Rule of law’ is described to be one of the founding values of the European Union.”<sup>532</sup> ‘Rule of Law’ is recognized as a fundamental principle by both the European Court of Justice, the Union’s own court, and the European Court of Human Rights, which the union adheres to.<sup>533</sup>

The European Union competence to act is further limited by the principles of conferral, subsidiarity and proportionality.

The principle of conferral limits the Union to acting only within the limits of the competence granted to it by the member states, and only to obtain the objectives set out by the member states. The principle of subsidiarity requires the Union should only act, in areas where the Union does not have exclusive competence, where “. . . the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, . . .”<sup>534</sup> The principle of proportionality dictates that the Union shall not act beyond what is necessary to achieve the objectives of the Treaties.<sup>535</sup>

The member states have granted the European Union competence to act to prevent and combat crime, with the objective of providing its citizens “freedom, security and justice”.<sup>536</sup> For this purposes, the member states have granted the Union competence to arrange for cooperation and coordination between police, judicial authorities and other competent authorities.<sup>537</sup>

It can, however, be argued to be questionable if the assessment and promotion of specific responses by the Union fits within the limitations of the principles of subsidiarity and proportionality.

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<sup>531</sup> Ibid, title I, art 1, para 2 and title II, art. 10, para 3.

<sup>532</sup> Ibid, title, I, art. 2.

<sup>533</sup> Popelier, Patricia, ‘Five Paradoxes on Legal Certainty and the Lawmaker’ (2008) 2 *Legisprudence*, 47, at footnote 3.

<sup>534</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, title I, art 5, para 3.

<sup>535</sup> Ibid, title I, art 5, para 4.

<sup>536</sup> Ibid, title I, art. 3, para 2.

<sup>537</sup> Ibid, title I, art. 3, para 2, and title V, art. 67 para 3.

With regards to the Union's principle of subsidiarity, domestic authorities can be argued to be sufficiently and even more sufficiently capable of developing and assessing approaches and specific responses best fit for countering their domestic organized crime problem, in their respective legal system and society. This can primarily be argued on the basis of the above detailed arguments that there is no consensus amongst the Member States of the Union about what constitutes organized crime and based on the difference between organized crime legislations in the member states.<sup>538</sup>

Furthermore, the previously detailed discussions from the field of pluralism and comparative law, suggest that real harmonization is hard to achieve especially if evaluated from a functionalistic perspective.<sup>539</sup> Additionally, these discussions show that each legal system is unique to its society and each society is unique to the legal system that governs it.<sup>540</sup> The assessment of best practice and experience by the European Union is therefore bound to either disseminate the Unions own perception of the social problem intended to counter, or that of one or more of the member states. In so doing, the Union or influential member states might unduly influence other member states.<sup>541</sup> Consequently, centralized development and assessment of responses to varieties of marginally different social problems, for multiple marginally different societies and legal systems, seems not to be a viable approach, nor seems it to be compatible with the European Union's principle of subsidiarity.

The principle of proportionality, requires the Union not to act beyond what is necessary to achieve the objectives sought. The Union's involvement in selection and development of approaches and responses is arguably disproportionate to the objective of promoting the use of non-criminal justice responses to counter organized crime, if information sharing would be sufficient to achieve the objective.

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<sup>538</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010).

<sup>539</sup> Zumbansen, Peer, 'Transnational comparisons: theory and practice of comparative law as a critique of global governance' in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186, at p 204 and 206

Zumbansen, Peer, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1 *Global Constitutionalism*, 16, at p 50 - 51.

<sup>540</sup> Müllerson, R A, *Ordering Anarchy: International Law in International Society* (Martinus Nijhoff Publishers 2000), at 88. As cited by: Boister, N, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law*, 953, at p 969.

<sup>541</sup> Boister, N, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law*, 953, at 968 - 970.

The European Union action, to select specific responses and appeal to its member states to adopt the selected responses, seems therefore questionable in the light of its principles of subsidiarity and proportionality.

When examining democratic legitimacy for the promotion on non-criminal justice responses, it is important to note that the European Union has for a long time been criticized for democratic deficiency.<sup>542</sup> The democratic deficiency is said to be caused by variety of factors.

The Union is criticized for contributing to increased powers of the Executive at the cost of the national parliaments of the member states, as the national governments are represented by both the Council and the Commission and acting on that level, they are not much accountable to their national parliaments.<sup>543</sup> Additionally, the Union is seen to adopt policies that are not supported by a majority in many, or even most member states.<sup>544</sup> Finally, the citizens of the European Union are said not to understand the Union, and are therefore unable to take part in it as a democratic system.<sup>545</sup>

This criticism is particularly relevant for the Area of Freedom, Security and Justice, where the parliament of the European Union has limited competence and the national parliaments can be argued to have little influence.<sup>546</sup> Additionally, the European Parliament had no formal jurisdiction in criminal matters, until the field came to a limited extent under the supranational power of the European Parliament in 2009.<sup>547</sup> Furthermore, part of the criticism on the European Union's 'democratic deficiency' claims the European Parliament too weak to

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<sup>542</sup> Follesdal, Andreas, and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS: Journal of Common Market Studies, 533. Moravcsik, Andrew, 'In Defense of the "democratic Deficit"' (2002) 40 JCMS: Journal of Common Market Studies, 603. Moravcsik, Andrew, 'What can we learn from the collapse of the European constitutional project?' (2006) 47 Politische Vierteljahresschrift, 219. Majone, Giandomenico, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 European Law Journal, 5.

<sup>543</sup> Follesdal, Andreas, and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS: Journal of Common Market Studies, 533, at p 534 - 535.

<sup>544</sup> Follesdal, Andreas, and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS: Journal of Common Market Studies, 533, at p 537.

<sup>545</sup> Follesdal, Andreas, and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS: Journal of Common Market Studies, 533, at p 536.

<sup>546</sup> Baker, Estella, and Christopher Harding, 'From past imperfect to future perfect? A longitudinal study of the Third Pillar' (2009) 34 European Law Review, 25.

<sup>547</sup> Baker, Estella, and Christopher Harding, 'From past imperfect to future perfect? A longitudinal study of the Third Pillar' (2009) 34 European Law Review, at p 29 and p 43 - 44; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1.

balance the executive power within the Union, and suffers it self from ‘democratic deficiency’.<sup>548</sup>

Sheptycki claims that “. . . the assumption in a democratic society is that the elected control penal policy”<sup>549</sup>. This might not be accurate when it comes to policies and norms created by the European Union in the field of the Area of Freedom, Security and Justice. Consequently, the above coverage raises concerns if the promotion of non-criminal justice responses as an approach to counter organized crime, as well as specific responses as best practices, lacks democratic legitimacy.

The involvement and influence of bureaucratic institutions and law enforcement authorities in creation of soft law and recommendations of the European Union raises concerns over legitimacy do to incompatibility with the Rule of Law and in particular the ‘separation of powers doctrine’<sup>550</sup>. Law enforcement officials and bureaucrats, domestically and at the international level, are seen to be instrumental in the creation of the different guidelines and recommendations created by the European Union on how to increasingly utilize non-criminal justice responses to counter organized crime.<sup>551</sup> The creation of these guidelines and recommendations seems not to be sufficiently guided by the legislative or reviewed by the

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<sup>548</sup> Follesdal, Andreas, and Simon Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *JCMS: Journal of Common Market Studies*, 533, at p 535; Lasan, Nicoleta, ‘How Far Can the European Parliament Correct the European Union's Democratic Deficit?’ (2008) 8 *Romanian Journal of European Affairs*, at p 21 - 25.

<sup>549</sup> Boister, N, ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law*, 953, at p 957. Citing: Sheptycki, ‘Law Enforcement, Justice and Democracy in the Transnational Arena: Reflections on the War on Drugs’ 24 *International Journal of the Sociology of Law* (1996) 61.

<sup>550</sup> Bondy, William, *The Separation of Governmental Powers: In History, in Theory, and in the Constitutions* (Columbia College 1896), at p 144 - 148; Barond de Montesquieu, Charles Louis de Secondat, *The Spirit of Law* (Batoche Books 2001), book XI, chapter 6.

<sup>551</sup> European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012); European Union, Presidency of the Council of the European Union, ‘Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward’ (European Union, December 6, 2011), in particular p 6; Hungarian delegation, ‘Complementary approaches and actions to prevent and combat organised crime’ (commonly referred to as ‘the Hungarian Handbook’) (European Union, May 30, 2011; European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012), at p 1; The Stockholm Program [2010] OJ C115/1, at p 20 – 21; The EUROPOL, official website <<https://www.europol.europa.eu>> accessed 11 January 2012. See on the Europol Platform for Experts: under Europol Expertise, accessed 4 July 2014.

judiciary.<sup>552</sup> Consequently, bureaucratic institutions of the executive, at the national and subnational level, are effectively influencing the legislative development under the authority of the European Union and obligations of member states of the Union under different international legal instruments in the field of crime control.<sup>553</sup>

Additional concerns must be raised over compatibility with the principle of 'legal certainty',<sup>554</sup> also embedded in the Rule of Law. The principle requires the rules of the society to be fixed and announced beforehand, making the authorities use of its coercive power in given circumstances foreseeable with adequate certainty, permitting those subject to the rules to plan their affairs so as not to become subject to the states coercive power.<sup>555</sup> Concerns for lack of legal certainty are caused by the secrecy of the European Union's evaluation and selection of best practices, from existing practices of the member states.<sup>556</sup> Particularly, as this study has shown domestic authorities to utilize existing legislations, not intended for countering organized crime, in a creative manner with low requirement of involvement and fault for the organized criminality – consequently this use of coercive state power may be argued not to be adequately foreseeable in some circumstances. Furthermore, the argument for the need for secrecy in the name of public security, arguing that individuals involved in organized crime could misuse the compilations made by the European Union to identify weaknesses in the system and avoid efforts of the authorities if they were publicly available, seems incompatible with the principle of Rule of

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<sup>552</sup> Baker, Estella, and Christopher Harding, 'From past imperfect to future perfect? A longitudinal study of the Third Pillar' (2009) 34 *European Law Review*, 25.

<sup>553</sup> Council Resolution on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it [1998] OJ C408/1; European Union, European Commission, 'Action Plan Implementing the Stockholm Programme' (European Union, April 20, 2000), at p 33; The Stockholm Program [2010] OJ C115/1, p 20 – 21; Council of the European Union, General Secretariat, 'Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017', (European Union, July 26, 2013), at p 7.

<sup>554</sup> 'Legal certainty': "A legal system that provides legal certainty guides those subject to the law. It permits those subject to the law to plan their lives with less uncertainty. It protects those subject to the law from arbitrary use of state power." See: Maxeiner, James R, 'Some Realism About Legal Certainty in the Globalization of the Rule of Law' (2008) 31 *Houston Journal of International Law*, 27 at p 30 - 32; Raz, Joseph, 'The Rule of Law and its Virtue' in *The authority of law: Essays on law and Morality* (Oxford Scholarship Online 2012), at p 212 - 224.

<sup>555</sup> Hayek, Friedrich A, *The Road to Serfdom: with The Intellectuals and Socialism* (The Institute of Economic Affairs 2005), at p 57.

<sup>556</sup> Hungarian delegation, 'Complementary approaches and actions to prevent and combat organised crime' (commonly referred to as 'the Hungarian Handbook') (European Union, May 30, 2011). The handbook is not publicly accessible, and request for access for the purposes of this study only resulted in access being granted to 5 of its 107 pages, consisting of Sándor Pintér's forward to the handbook. See reference to the handbook in: 'A multidisciplinary and administrative approach to combating organised crime' (Ministry of Justice DK 8 March 2012), p 2.

Law.<sup>557</sup> The concerns for incompatibility with the Rule of Law will be discussed in further details under a separate subchapter on fundamental principles of law below.

The final democratic criteria to be examined here is that of transparency. Transparency is ensured under Article 10 that requires the Union to make decisions as openly and as close as possible to the citizen, ensuring the citizen's right to democratic participation.<sup>558</sup> Without transparency, the citizen would not be able to participate in the democratic governance of the Union, as he would not be able to make informed decisions when choosing representatives or keeping representatives democratically accountable. Transparency has been argued to be crucial for democratic decision making, in particular within the EU.<sup>559</sup>

As detailed above, the research into the promotion of non-criminal justice responses by the European Union shows transparency to be lacking in the promotion of non-criminal justice responses. Information about the responses being promoted is not publicly available, for reasons of public security, and the approach is ill defined in publicly available documents.<sup>560</sup> Additionally, the process and criteria for selecting responses to be promoted is not publicly available. Furthermore, the problem intended to counter is ill defined and consensus is lacking amongst the member states of what are the constitutive characteristics of the social problem that has been called organized crime.<sup>561</sup> Finally, the justification for the necessity of the response is primarily based on threat assessments, which again are largely based on restricted information.<sup>562</sup>

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<sup>557</sup> Email from Jakob Thomsen for the General Secretariat of the Council of the European Union to author (24 July 2013).

<sup>558</sup> Ibid, title I, art 1, para 2 and title II, art. 10, para 3.

<sup>559</sup> Héritier, Adrienne, 'Composite democracy in Europe' (2003) 10 Journal of European Public Policy, 814 at p 828 - 831.

<sup>560</sup> See how the European Union has established platforms for sharing existing practices and experience of the member states, as well as developing new responses and approaches, the work of which are not publicly available. Additionally, the main compilation of responses promoted by the Union is not publicly available: Hungarian delegation, 'Complementary approaches and actions to prevent and combat organised crime' (commonly referred to as 'the Hungarian Handbook') (European Union, May 30, 2011)

<sup>561</sup> European Union, General Secretariat of the Council of the European Union, 'Summary of the meeting of the Civil Liberties, Justice and Home Affairs Committee of the European Parliament' (European Union, March 26, 2013), at p 8; European Union, Commission of the European Communities, 'Developing a strategic concept on tackling organised crime' (European Union, June 2, 2005), at p 1; Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010), at p 120.

<sup>562</sup> See on the reliance on the assessments of Europol: The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, at p 3. Van Duyne, Petrus C, 'OCTA 2006: the unfulfilled promise' (2007) 10 Trends in Organized Crime, 120. European Parliament resolution of 25 October 2011 on organised crime in the European Union [2013] OJ C131 E/66, at p 67. Council of the European

The European Union is therefore promoting non-criminal justice responses as an approach to counter organized crime, without informing the public about what constitutes such an approach. Neither, what responses are being promoted, nor what constitutes the behaviour that will initiate the utilization of these responses. This lack of transparency effectively prevents democratic accountability.

The examination of the transnationalization of non-criminal justice responses within the European Union raises concerns for lack of legitimacy. The concerns have to do with the decision making at the European Union level, as well as absence of efforts by the Union to secure or promote legitimate authorization at the domestic level. In fact, the initiative could be argued to promote non-criminal justice responses through law enforcement agencies of the member states in a way that by design boycotts both legislative authorities and public discussion. This process seems to be in line with Nadelmann's claim of international law being used to "... develop a cosmopolitan international morality without the citizens of state parties having much to do with their adoption or application."<sup>563</sup>

## Doctrinal Weaknesses

The third part of the criteria is if the transnationalization of non-criminal justice responses raises concerns for doctrinal weaknesses. The examination focuses on doctrinal weaknesses that have previously been claimed to haunt the system of Transnational Criminal Law.<sup>564</sup>

The previously mentioned lack of consensus for what are the constitutive characteristics of the subject matter of the initiative, organized crime, must be considered a major doctrinal

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Union, General Secretariat, 'Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017', (European Union, July 26, 2013), at p 4.

See on the criticism: Zoutendijk, Andries Johannes, 'Organised crime threat assessments: a critical review' (2010) 54 American Journal of Criminal Justice, 63; Van Duyne, P C, and T Vander Beken, 'The incantations of the EU organised crime policy making' (2008) 51 American Journal of Criminal Justice, 261. Calderoni, Francesco, Organized crime legislation in the European Union (Springer Verlag 2010), at p 36 - 37.

<sup>563</sup> Boister, N, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law, 953, at p 957 - 958. Citing: Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society', 44 International Organisation (1990) 479, at 481.

<sup>564</sup> Boister, N, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law, 953, at p 958.

weakness for any initiative for the development of approaches or responses to the said social problem.

There is little to be found about the definition of organized crime in the publicly available documents mapping the development of transnational non-criminal justice responses within the European Union. However, what can be found suggest that those concerned consider the definition in need of improvement. The Commission of the European Communities noted in its communication to the Council and the European Parliament the challenge in tackling organized crime caused by difficulties in defining “criminal organisation”.<sup>565</sup> Similarly, at a meeting of the Civil Liberties, Justice and Home Affairs Committee of the European Parliament, committee members saw reasons to discuss “. . . the need to develop better the definitions in relation to organised crime, . . .”<sup>566</sup> The survey presented to the EU by the delegation of the Netherlands touches on this when discussing how to strengthen European cooperation, where France is reported to stress: “. . . the need to first agree on the definition and scope of the non-penal approach towards organised crime before taking steps towards joint European measures.”<sup>567</sup> Judging from the academic discussion about Transnational Criminal Law, it seems that such agreement would better have been reached before the steps were taken towards strengthening European cooperation in that field. This problem is highlighted by academic discussions showing lack of consensus about what constitutes organized crime and criticism of the definitions that have been drafted at the international level.<sup>568</sup> This has been covered in details in the literature review.

Calderoni showed that within the European Union “. . . a common understanding of the concept of criminal organization is lacking and that there are significant inconsistencies among

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<sup>565</sup> European Union, Commission of the European Communities, ‘Developing a strategic concept on tackling organised crime’ (European Union, June 2, 2005), at p 1.

<sup>566</sup> European Union, General Secretariat of the Council of the European Union, ‘Summary of the meeting of the Civil Liberties, Justice and Home Affairs Committee of the European Parliament’ (European Union, March 26, 2013), at p 8.

<sup>567</sup> The Council of the European Union, the Netherlands delegation, ‘Analysis Administrative/Non-Penal Instruments in various Member States & Proposal Future Steps’ (The European Union February 25, 2010), at p 19.

<sup>568</sup> Baker, Estella, ‘The legal regulation of transnational organised crime: Opportunities and limitations’ in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge 2003), 183 at p 185. Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), p 25. Schloenhardt, Andreas, ‘Fighting Organized Crime in the Asia Pacific Region: New Weapons, Lost War’ (2012) 2 *Asian Journal of International Law*, 137 at p 158. Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 36 - 46.



national legal systems.”<sup>569</sup> Additionally, he claims that the definition adopted by the European Union as part of its Framework Decision of 2008 does not reflect best knowledge and scientific research in this field and is in fact inferior in quality than the definitions adopted by some of its member states.<sup>570</sup>

The longstanding difficulty with creating sufficient definition for organized crime makes it difficult to select and develop responses that fit the social problem intended to counter, do to lack of clarity as to what kind of behaviour these responses are intended to counter. Additionally, the insufficient definition makes the scope of the responses adopted insufficiently restricted to only the social problems intended to counter. Nevertheless, the transnationalization of non-criminal justice responses is carried on based on the criticised definitions, without much apparent efforts to improve the definition or make up for the flaws by further defining the subject of individual initiatives, approaches or responses.

Widening scope of criminal liability is a concern that has been addressed in the context of promotion of organized crime legislations by the system or Transnational Criminal Law, particularly the element of conduct, culpability and level of involvement.<sup>571</sup> Surely, by definition, the non-criminal justice responses do not carry with them criminal liability, but they do carry consequences that often are repressive to individuals. For example, Huisman and Koemans, when discussing the administrative approach in the Netherlands, noted that: “Measures are individualised and are based on information (suspicions) regarding previous behaviour. The consequences of these administrative measures can also be more far-reaching than those of criminal sanctions, while the safeguards of due process are considerably less so.”<sup>572</sup>

This study has shown non-criminal justice responses to be utilized to counter organized crime in ways that bring far-reaching and repressive consequences for individual, raising

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<sup>569</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 120.

<sup>570</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 36 - 37 and 171.

<sup>571</sup> Boister, N, ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law*, 953, at p 958; Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), at p 26 - 38 and 286 - 291.

<sup>572</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 *Erasmus Universiteit Rotterdam: Law Review*, 121, at p 142.

important concerns for widening of legal liability.<sup>573</sup> This research shows low requirements for showing involvement, fault and causation for domestic authorities to be able to utilize non-criminal justice responses.<sup>574</sup> Authorities were found to introduce remedies against individuals without having established any element of criminal conduct or fault for the criminal conduct in question. Some remedies seem to have been introduced mainly based on the individual's involvement with an association considered to be involved in organized crime. Such involvement may not be limited to formal membership or proven participation, but can be based on much lesser involvement where no act of participation is required. An example would be previously detailed case of Mr. Stable's.<sup>575</sup> Also, and most importantly, there seems to be no requirement to show an individual to be at fault for the criminal activity attributed to the criminal organization in question. In fact it seems to be possible to introduce non-criminal justice responses that are repressive on individuals, based on assessment of the threat posed by organizations of which the individual is involved with.<sup>576</sup> Some of the cases that were found may even raise concerns for establishing guilt by association.

Furthermore, the non-criminal justice responses that establish grounds for criminal sanctions have attracted criticism for widening the scope of the criminal law, inter alia by: bringing minor social problems within the scope of the criminal law, providing authorities a remedy for sanctioning individuals where previously there are no grounds for criminal sanctions, for circumventing procedural safeguards, for providing repressive measures against individuals without the involvement of the judiciary, and for incompatibility with Human Rights requirements for standard of proof and individual's right to fair trial.<sup>577</sup> An example would be

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<sup>573</sup> See the non-criminal justice responses found by this study at p 65 – 103.

<sup>574</sup> *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319 (CanLII November 17, 2011); *Collins v. Canada (Citizenship and Immigration)*, 2009 (FC) 16327 (CanLII March 17, 2009); Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010. Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010; *Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's)*, 2013 ONCA 157 (CanLII March 18, 2013), at p 11 - 13.

<sup>575</sup> *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (FCA), [2001] 2 F.C. 297, 265 N.R. 121 at par. 25, 55-62. As cited in: *Ismeal v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 198 (CanLII), 2010 FC 198, para 20. As cited in: *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319 (CanLII November 17, 2011), para 45.

<sup>576</sup> Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6158/2010, p 11; Reykjavík district court (Héraðsdómur Reykjavíkur) judgment no. E-6159/2010, p 10; *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319 (CanLII November 17, 2011), para 2, 6, 7, 37 and 44.

<sup>577</sup> Huisman, Wim, and Monique Koemans, 'Administrative Measures in Crime Control' (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121; Huisman, Wim, and Hans Nelen, 'Gotham unbound Dutch style' (2007) 48 Policing and Society, 87;

where non-criminal justice responses are introduced that place conditions on individuals, the breach of which attracts criminal liability, such as the control orders under ‘the bikei law’ in Australia.<sup>578</sup>

The European Union seems to have failed to address the lack of a doctrinal basis for this apparent widening scope of liability caused by utilization of non-criminal justice responses to organized crime, before promoting the approach.

Deciding up on the appropriate procedural rules and safeguards for non-criminal justice responses is yet another doctrinal issue that has been raised with non-criminal justice responses before courts in different jurisdictions and has been the subject of an extensive academic discussion.<sup>579</sup> Concerns have been raised over the exception of non-criminal justice responses that are repressive on individuals and seem to be punitive in nature, from procedural safeguards and Human Rights attributed to criminal proceedings, in the absence of sound doctrinal basis for such exception. The main concerns have been covered in the literature review and will be discussed in details in the subchapter on compatibility with Human Rights and fundamental principles of Law. Addressing the concerns for the appropriate procedural rules seems of a particular importance, as the utilization of these responses to criminal activity has been argued to origin from efforts to bypass procedural safeguards that limited criminal justice responses.<sup>580</sup>

Furthermore, as discussed in detail in the literature review, scholarly work on pluralism in global governance and on comparative legal studies suggest there to be important theoretical

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<sup>578</sup> Ayling, Julie, ‘Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs’ (2011) 36 *American Journal of Criminal Justice*, 250, at p 258. Loughnan, Arlie, ‘The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)’ (2009) 20 *Current Issues in Criminal Justice*, 457, at p 258 - 259.

<sup>579</sup> Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 *Erasmus Universiteit Rotterdam: Law Review*, 121, at p 142; Ayling, Julie, ‘Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs’ (2011) 36 *American Journal of Criminal Justice*, 250, at p 256; Crawford, Adam, ‘Governing Through Anti-social Behaviour’ (2009) 49 *British Journal of Criminology*, 810 at p 818 footnote 5. Von Hirsch, Andrew, Ashworth, Andrew, Wasik, Martin, Smith, ATH, Morgan, Rod, and Gardner, John, ‘Overtaking on the Right’ (1995) 145 *New Law Journal*, 1501, at fourth subchapter; *R (McCann and others) v. Crown Court at Manchester* [2003] 1 A.C. 787. (UK case) As cited in Crawford, Adam, ‘Governing Through Anti-social Behaviour’ (2009) 49 *British Journal of Criminology*, 810, at p 818 footnote 5

<sup>580</sup> Ayling, Julie, ‘Criminalizing Organizations: Towards Deliberative Lawmaking’ (2011) 33 *Law & Policy*, 149 at p 164. Zedner, Lucia, ‘Preventive Justice or Pre-Punishment? The Case of Control Orders’ (2007) 60 *Current Legal Problems*, 174 at 175 - 176. Loughnan, Arlie, ‘The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)’ (2009) 20 *Current Issues in Criminal Justice*, 457 at 458 - 459.

and practical difficulties with the creation of universal norms and comparison of legislations between jurisdictions.<sup>581</sup> Furthermore, the existing literature on legal comparison suggests that transnational legal comparison requires “interdisciplinary understanding of functionalist comparisons”<sup>582</sup> in its appropriate context. Such transnational legal comparison has been suggested to require the appropriate legal-, historical-, economic-, political-, social- and ideological-context both locally and internationally.<sup>583</sup> Such comparison would require interdisciplinary study of the relevant legal and non-legal norms, routines and social practices.<sup>584</sup> Current attempts of the European Union to select and promote best practices based on existing practices and experience of member states, seems to contradict this pluralist legal thinking. As the selection seems to fail to acknowledge how difference between the member states, such as social and legal difference, might affect the implementation and effects of the responses - effectively making it hard to select single set of best practices for all the member states.

The existing literature on domestic non-criminal justice responses shows the responses to have raised important and relevant concerns for doctrinal weaknesses of these responses at the domestic level.<sup>585</sup> Study of the publicly available document in this subject area does not reveal any evidence of the European Union having, in its promotion of non-criminal justice responses to criminal behaviour, attempted to address the above mentioned doctrinal issue.

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<sup>581</sup> Walker, Neil, ‘Taking Constitutionalism Beyond the State’ (2008) 56 Political Studies, at p 533 - 541. Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] Law Society and Economy Working Papers, at p 7 - 9 and 40 - 45.

<sup>582</sup> Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 Global Constitutionalism, 16, at p 51.

<sup>583</sup> Zumbansen, Peer, ‘Transnational comparisons: theory and practice of comparative law as a critique of global governance’ in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186, at p 204 and 206

Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 Global Constitutionalism, 16, at p 50 - 51.

<sup>584</sup> Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 Global Constitutionalism, 16, at p 50 – 51. Zumbansen, Peer, ‘Transnational comparisons: theory and practice of comparative law as a critique of global governance’ in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), 186, at p 204 and 206.

<sup>585</sup> Ayling, Julie, ‘Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs’ (2011) 36 American Journal of Criminal Justice, 250; Huisman, Wim, and Monique Koemans, ‘Administrative Measures in Crime Control’ (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121; Macdonald, Stuart, ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO’s Definition of ‘Anti-Social Behaviour’’ (2006) 69 Law & Policy, 183.

Consequently, the European Union seems to be promoting domestic responses that are haunted by doctrinal weaknesses, while the promotion it self seems equally haunted by doctrinal weaknesses. The Unions seems to do so without either addressing the issues, or bringing those issues to the attention of its member states, to ensure that they will be adequately addressed in the evidence based decision making at the domestic level.

## **Human Rights and Fundamental Principles of Law**

Emphasize on compatibility with fundamental principles of law and Human Rights in the promotion of non-criminal justice responses by the European Union is the fourth part of the criteria examined. Compatibility with Human Rights in the promotion of non-criminal justice responses is of particular importance in the light of the value that has been given to Human Rights in International Law in general and by the European Union in particular.<sup>586</sup>

The treaty on the European Union states that the Union is “. . . founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, . . .”<sup>587</sup> Additionally, member states of the European Union have recognized Human Rights as being of a higher status and even made themselves subject to jurisdiction of an international court to ensure this higher status of Human Rights to be respected.<sup>588</sup> Furthermore, the European Union is itself in the process of accessing the European Convention of Human Rights, and subsequently becoming subject to its international court.<sup>589</sup> These commitments

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<sup>586</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, at p 15 and art. 2; Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

<sup>587</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, title, I, art. 2.

<sup>588</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, at p 15; Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Charter of Fundamental Rights of the European Union [2010] OJ C83/02

<sup>589</sup> Council of Europe, ‘Accession of the European Union to the European Convention on Human Rights’ (Council of Europe, official website, no date) <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp)> accessed 19 July 2014; Gragl, Paul, ‘A giant leap for European Human Rights? The Final Agreement on the European Union’s accession to the European Convention on Human Rights’ (2014) 51 Common Market Law Review.

should put compatibility with Human Rights into the forefront of all actions of the European Union.

Still, the evidence show that in discussing the promotion of non-criminal justice responses within the European Union, different bodies of the Union have seen reasons to specifically emphasize that responses utilized to counter organized crime need to be compatible with Human Rights and fundamental rights of the Union.<sup>590</sup> Arguably suggesting that such compatibility was lacking.

However, both the Council and the Commission have in the context of the promotion of non-criminal justice responses raised the view that fundamental rights need to be balanced against the interest of efficient law enforcement and prosecution. In 2005 the Commission stated, in the context of developing strategy for countering organized crime: “In fighting this scourge all actors must balance efficient law enforcement and prosecution of OC, and the protection of fundamental rights and freedoms.”<sup>591</sup> A similar statement by the Council, in its 2000 millennium strategy, states that development of legal means to provide investigative methods with respect to organized crime “. . . requires finding the proper balance between effectiveness and the protection of fundamental human rights.”<sup>592</sup> The view expressed here is problematic as fundamental rights are generally considered fundamental set of rules, limited only by the legitimate restrictions allowed for and described in the relevant texts and judicial precedence. The main international Human Rights conventions do not allow for limitation in the interest of effective law enforcement and prosecution.<sup>593</sup> Nor are such restrictions known to exist as legitimate limitations on fundamental Human Rights.

As covered in the literature review, various non-criminal justice responses in different jurisdictions have been criticized for incompatibility with fundamental principles of law and Human Rights.

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<sup>590</sup> European Parliament resolution of 25 October 2011 on organised crime in the European Union [2013] OJ C131 E/66, at p 72.

<sup>591</sup> European Parliament resolution of 25 October 2011 on organised crime in the European Union [2013] OJ C131 E/66, at p 2.

<sup>592</sup> The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, at p 15.

<sup>593</sup> Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

Non-criminal justice responses have been criticized for failing to provide procedural safeguards compatible with fundamental principles of law and Human Rights. The main argument is that the non-criminal justice responses are *de facto* criminal in nature.<sup>594</sup> This *de facto* criminal nature is argued to be caused by characteristics such as the proceedings being intended to counter criminal problems, being based on previous behaviour, even criminal behaviour. Furthermore, the criminal nature of the responses has been argued based on the ability of the non-criminal justice responses to bring about remedies, which although not criminal punishments, are repressive on individuals and can in fact be more far reaching than criminal sanctions.<sup>595</sup> Additionally, the ability of the non-criminal justice responses to place conditions on individuals that will bring criminal sanctions if breached has been argued to show its nature as criminal sanctions.<sup>596</sup>

Based on their *de facto* criminal nature and their ability to provide grounds for criminal sanctions, non-criminal justice responses have been argued to require the full range of the procedural safeguards of the criminal law to be applied.<sup>597</sup> Failure to secure procedural rights up to the level of the criminal law standards has been argued to be a breach of the right to fair trial under article 6 of the European Convention of Human Rights and article 14 of the International Covenant on Civil and Political Rights.<sup>598</sup> Additionally, concerns have been raised with some of those non-criminal justice responses being incompatible with the right to freedom of association.<sup>599</sup>

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<sup>594</sup> King, Colin, 'Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland' (2013) 34 Legal Studies, 371, at p 376 - 382; Huisman, Wim, and Monique Koemans, 'Administrative Measures in Crime Control' (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 140.

<sup>595</sup> Huisman, Wim, and Monique Koemans, 'Administrative Measures in Crime Control' (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 142.

<sup>596</sup> Ayling, Julie, 'Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs' (2011) 36 American Journal of Criminal Justice, 250, at p 256 - 257; Macdonald, Stuart, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour'' (2006) 69 Law & Policy, 183.

<sup>597</sup> Huisman, Wim, and Monique Koemans, 'Administrative Measures in Crime Control' (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 139 - 140 and 142.

<sup>598</sup> Huisman, Wim, and Monique Koemans, 'Administrative Measures in Crime Control' (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 142; King, Colin, 'Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland' (2013) 34 Legal Studies, 371, at p 376 - 382; Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 6; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)), art. 14.

<sup>599</sup> Berkovic, Nicola, 'High Court rejects challenge to controversial NSW bkie laws' (The Australian, October 8, 2014) <<http://www.theaustralian.com.au/news/high-court-rejects-challenge-to-controversial-nsw-bikie-laws/story-e6frg6n6-1227084062541>> accessed 28 November 20 Convention for the protection of Human Rights and

The European Court of Human Rights has decided that although the requirements guaranteed by the concept ‘fair trial’ may differ between trials that evolve around criminal charges and those determining civil rights and obligations, the rights restricted to criminal charges under paragraphs 2 and 3 of article 6 may also be applicable in cases determining civil rights and obligations.<sup>600</sup> The Court has claimed the authority to examine if sanctions are to be considered ‘criminal’ for the purpose of the convention. Subsequently, the court has decided that disciplinary or regulatory sanctions can be subject to the rights guaranteed to those facing criminal charges under the article.<sup>601</sup> In its criteria, the Court looks at the classification of the domestic legislation, the nature of the offence, and finally, the nature and degree of severity of the sanction at risk for the individual. The court has decided that “. . . the general character of the rule and the purpose of the penalty, being both deterrent and punitive, . . .”<sup>602</sup> is decisive for evaluating if the offence in question is criminal in nature, for the purpose of Article 6 of the Convention.<sup>603</sup> The Hungarian handbook is cited to explain the concept of administrative approach, stating for example that “The administrative approach has both a penal and preventive aspect.”<sup>604</sup> The European Court of Human Rights might therefore see it fit to examine if non-criminal justice responses should be considered ‘criminal’, not only for the purpose of article 6, but all rights and freedoms under the convention.<sup>605</sup>

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Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 11; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 22.

<sup>600</sup> *Albert and Le Compte v. Belgium* (App no 7299/75; 7496/76) (1983) Series A no 58 [28, 30 and 39]; *Dumbo Beheer B.V. v The Netherlands* (App no 14448/88) (1993) Series A no 274 [32 - 35].

<sup>601</sup> *Öztürk v Germany* (App no 8544/79) (1984) Series A no 73 [48 - 50]; *Engel and Others v The Netherlands* (App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (1976) Series A no 22 [82 and 85]. King, Colin, ‘Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland’ (2013) 34 Legal Studies, 371, at p 376 - 377.

<sup>602</sup> *Öztürk v Germany* (App no 8544/79) (1984) ECtHR Series A no 73, at para. 53. As cited in: King, Colin, ‘Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland’ (2013) 34(3) Legal Studies, 371, at p 377

<sup>603</sup> King, Colin, ‘Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland’ (2013) 34 Legal Studies, 371, at p 376 - 377.

<sup>604</sup> European Union, Presidency of the Council of the European Union, ‘Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward’ (European Union, December 6, 2011), at p 3. Citing: Hungarian delegation, ‘Complementary approaches and actions to prevent and combat organised crime’ (commonly referred to as ‘the Hungarian Handbook’) (European Union, May 30, 2011, at p 10.

<sup>605</sup> Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 6 and 7.



However, the European Court of Human Rights has decided against applicability of rights specific for criminal cases under the right to fair trial, in cases that had to do with civil forfeiture.<sup>606</sup> The Court stated, in it's leading case, that it was decisive for the non criminal nature of civil forfeiture that these preventive measures were neither designed to punish a specific offence, nor do these measures imply a finding of a guilt for a specific offence.<sup>607</sup> The decision suggests that preventive non-criminal justice responses that do not rely on a finding of guilt for a specific offence should not be considered criminal in nature.

The main issues that have been raised with the various non-criminal justice responses for incompatibility with the right to fair trial, have primarily to do with the evidential rules of these responses. It has been argued that the required standard of proof needs to be the 'beyond reasonable doubt' standard of the criminal law, as opposed to the 'preponderance of the evidence' of the civil law.<sup>608</sup>

Additionally, the ability of authorities to rally on 'criminal intelligence', that may not be disclosed to the defence in obtaining court orders as under the 'bikie law' in Australia, has been argued to violate the right to fair trial, specifically paragraph 3 of article 14 of the International Covenant on Civil and Political Rights.<sup>609</sup> However, rights under paragraph 3 are granted exclusively to those facing criminal charges.

Furthermore, concerns have been raised with allowing the use of hearsay evidence, for example for obtaining Anti-Social Behaviour Orders in the United Kingdom.<sup>610</sup> Again however,

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<sup>606</sup> King, Colin, 'Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland' (2013) 34 Legal Studies, 371, at p 378 - 382.

<sup>607</sup> *M v Italy* (App. no 12386/86) (1991) (ECtHR 15 April 1991)

<sup>608</sup> Crawford, Adam, 'Governing Through Anti-social Behaviour' (2009) 49 British Journal of Criminology, 810 at p 818 footnote 5; Von Hirsch, Andrew, Ashworth, Andrew, Wasik, Martin, Smith, ATH, Rod Morgan, Rod, and Gardner, John, 'Overtaking on the Right' (1995) 145 New Law Journal, 1501, at fourth subchapter. *R (McCann and others) v. Crown Court at Manchester* [2003] 1 A.C. 787. Guymon, Carie-Lyn Donigan, 'International Legal Mechanisms for Combating Transnational Organised Crime' (2000) 18 Berkeley Journal of International Law 53 at p 98. As cited in Crawford, Adam, 'Governing Through Anti-social Behaviour' (2009) 49 British Journal of Criminology, 810 at p 818 footnote 5. Ayling, Julie, 'Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs' (2011) 36 American Journal of Criminal Justice, 250, at p 256 - 257.

<sup>609</sup> Ayling, Julie, 'Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs' (2011) 36 American Journal of Criminal Justice, 250, at p 257; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 14, para 3.

<sup>610</sup> Huisman, Wim, and Monique Koemans, 'Administrative Measures in Crime Control' (2008) 1 Erasmus Universiteit Rotterdam: Law Review, 121, at p 128 - 129; Crawford, Adam, 'Governing Through Anti-social Behaviour' (2009) 49 British Journal of Criminology, 810, at p 818.

the right to fair trial generally only carries with it the right for a person to examine witnesses relied on in a case against him, when that person is accused of a crime.<sup>611</sup>

Finally, the ‘bikie law’ in Australia allows for control orders that ban individuals from communicating with other individuals, based on involvement with an organization that has previously been declared criminal, but without establishing personal guilt.<sup>612</sup> The High Court of Australia has recently rejected a challenge that sought for the measure to be found incompatible with fundamental rights of freedom of association.<sup>613</sup> It is in fact well established that the right to freedom of association is not an absolute right, the right is generally limited by legitimate restrictions such as in the interest of national security or public safety; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others.<sup>614</sup> These restrictions need generally to be prescribed by law and be necessary in a democratic society.<sup>615</sup> Such legitimate restrictions can arguably provide a basis for limiting freedom of association in cases of, organized, serious and violent criminal activity.

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<sup>611</sup> Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 6; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 14.

<sup>612</sup> Ayling, Julie, ‘Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs’ (2011) 36 American Journal of Criminal Justice, 250, at p 251 - 252 and 255 - 257; Loughnan, Arlie, ‘The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)’ (2009) 20 Current Issues in Criminal Justice, 457, at p 462 - 464.

<sup>613</sup> Berkovic, Nicola, ‘High Court rejects challenge to controversial NSW bikie laws’ (The Australian, October 8, 2014) <<http://www.theaustralian.com.au/news/high-court-rejects-challenge-to-controversial-nsw-bikie-laws/story-e6frg6n6-1227084062541>> accessed 28 November 2014

<sup>614</sup> The legitimate restrictions listed here are those of the European Convention of Human Rights, applied by the European Court of Human Rights for testing legitimacy of limitations. See: *Sidiropoulos and others v. Greece* (App no 26695/95) (1998) ECHR 1998-IV (n 42) [38]. ECHR para 2 art 11. On limitation of freedom of association under the Canadian Charter of Rights, for criminal or violent activity, see: *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319 (CanLII November 17, 2011), para 33. Citing: ‘Suresh v Canada (MCI)’, 2002 SCC 1 (CanLII), [2002] 1 SCR 3; See also: Sigursteinsson, Bjarni, ‘Samræmist bann við skipulögðum glæpasamtökum gildandi manntöndum á Íslandi?’ (Is a Ban on Criminal Organizations Compatible with Human Rights in Iceland?) (2012) 6 Lögfræðingur, 23.

<sup>615</sup> The criteria of being prescribed by law and be necessary in a democratic society is part of the test for legitimacy of limitations of rights and freedoms under the European Convention of Human Rights, applied by the European Court of Human Rights. See: *The Sunday Times v. the United Kingdom* (App no 6538/74) (1979) Series A no 30 [49]. *Rekvenyi v. Hungary* (App no 25390/94) (1999) ECHR 1999-III [34]; *Young, James and Webster v. the United Kingdom* (App no 7601/76 ; 7806/77) (1982) Series A no 55 [63]. *Rekvenyi v. Hungary* (App no 25390/94) (1999) ECHR 1999-III [42]; *United Communist Party of Turkey and Others v. Turkey* (App no 19392/92) (1998) ECHR 1998-I [42 – 47]; *Vogt v. Germany* (App no 17851/91) (1995) Series A no 323 [52]. *Jersild v. Denmark* (App no 15890/89) (1994) ECHR 23 September 1994 [31 – 37]

Concerns for the incompatibility of some non-criminal justice responses with the right to freedom of association have been raised in other jurisdictions as well.<sup>616</sup> The Federal Court of Canada has rejected this challenge on the basis that freedom of association under the Canadian Charter does not protect criminal or violent activity.<sup>617</sup> Moreover, the European Court of Human Rights has on a number of occasions accepted limitations of rights and freedoms of the European Convention of Human Rights for the legitimate aim of prevention of crime.<sup>618</sup>

Regarding fundamental principles of law, all the above issues can be said to raise concerns for violation of established fundamental principles of the criminal law, were they to be found applicable to the non-criminal justice responses, based on their punitive in fact nature, reliance on criminal behaviour, etc.

Additionally, concerns have been raised for incompatibility of non-criminal justice responses with the Rule of Law. In particular concerns have been raised with the incompatibility with ‘legal certainty’ a fundamental principle of law embedded in the Rule of Law. Friedrich A Hayek has elegantly described the principle of legal certainty:

“Stripped of technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”<sup>619</sup>

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<sup>616</sup> *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319 (CanLII November 17, 2011), para 33 - 37; Berkovic, Nicola, ‘High Court rejects challenge to controversial NSW bikie laws’ (The Australian, October 8, 2014) <<http://www.theaustralian.com.au/news/high-court-rejects-challenge-to-controversial-nsw-bikie-laws/story-e6frg6n6-1227084062541>> accessed 28 November 2014; Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 11; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 22.

<sup>617</sup> *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319 (CanLII November 17, 2011), para 33 - 37.

<sup>618</sup> *Üner v. the Netherlands* (App no 46410/99) (2006) ECHR 2006-XII [54, 57, 61, 63, 67]. *Kaya v. Germany* (App no 31753/02) ECHR 28 June 2007 [56, 61, 71]. *C. v. Belgium* (App no 21794/93) (1996) ECHR 1996-III [28, 32]. *Raimondo v. Italy* (App no 12954/87) (1994) Series A no 281-A [39]. *Lüdi v. Switzerland* (App no 12433/86) (1992) Series A no 238 [39]. See view of the Human Rights Committee: Gareth Anver Prince v. South Africa (Communication no 1474/2006) OHCHR Vol. II (2008), Annex V, sect. Z (p. 261-273) [7.2 – 8].

<sup>619</sup> Hayek, Friedrich A, *The Road to Serfdom: with The Intellectuals and Socialism* (The Institute of Economic Affairs 2005), at p 57.

These concerns have been raised with for example the Anti-Social Behaviour Orders, based on the insufficient definition of behaviour that could be considered anti-social for the purpose of obtaining a court order.<sup>620</sup> Consequently, the citizens is not able to anticipate with fair certainty what kind of behaviour might be deemed anti-social for the purpose of the Anti-Social Behaviour Orders, and subsequently not sufficiently able to avoid acting in a way that does not initiate the coercive powers of the authorities.

Furthermore, non-criminal justice responses that lack clear legal basis, raise concerns for violating the Rule of Law and in particular the principle of legal certainty. Such clear legal basis has been claimed to be lacking for some of the non-criminal justice responses utilized by authorities in member states of the European Union.<sup>621</sup>

Finally, as previously noted, concerns for lack of due process in depriving individuals of their liberty have been raised with the 'bikie laws' in Australia.<sup>622</sup>

As previously noted, Human Rights and the Rule of Law are stated to be amongst the founding values of the Union in the Treaty on European Union.<sup>623</sup> Admittedly, without an access to the criteria for selection of the non-criminal justice responses to be promoted by the Union or information about the responses being promoted, the compatibility of the promotion with Human Rights and the Rule of Law in selection of responses to promote can not be adequately examined.

However, the very secrecy that surrounds the promotion of non-criminal justice responses by the European Union suggests lack of respect for the principle of legal certainty, and thereby the Rule of Law. By concealing the non-criminal justice responses that the European Union is appealing to its member states to adopt, the Union can be seen to limit the ability of its citizens to foresee how authorities within the Union can be expected to use its coercive powers in given

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<sup>620</sup> Macdonald, Stuart, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour'' (2006) 69 Law & Policy, 183, at p 195 - 203.

<sup>621</sup> The Council of the European Union, the Netherlands delegation, 'Analysis Administrative/Non-Penal Instruments in various Member States & Proposal Future Steps' (The European Union February 25, 2010), at p 13 and 17.

<sup>622</sup> Ayling, Julie, 'Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs' (2011) 36 American Journal of Criminal Justice, 250, at p 251 - 252; Loughnan, Arlie, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)' (2009) 20 Current Issues in Criminal Justice, 457, at p 462 - 464.

<sup>623</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, title, I, art. 2.

circumstances and thereby limiting their ability to plan their affairs based on that knowledge.<sup>624</sup> Furthermore, request for access to the Hungarian handbook, previously mentioned compilation of non-criminal justice responses promoted as best practice by the European Union, was denied with arguments that seem to be incompatible with the principle of legal certainty.<sup>625</sup> The General Secretariat of the Council of The European Union emphasized the importance of keeping secret the details of preventive measures and actions to counter organized crime, so individuals involved in organized crime could not find possible weaknesses for furthering their activities.<sup>626</sup> This is in turn argued to weaken the efforts of various law enforcement authorities to counter organized crime in the interest of public security. These arguments seem not to be compatible with the principle of legal certainty. However, it is unclear to what extent this response reflects the emphasis placed in the Rule of Law by the European Union when it comes to utilization of non-criminal justice responses.

Transnationalization of non-criminal justice responses seems therefore to raise no lesser reasons for concern for incompatibility with fundamental principles of law and Human Rights than has been claimed to be the case with the system of Transnational Criminal Law.<sup>627</sup> Firstly, transnational efforts for promoting the approach and specific responses seem to fail to emphasize compatibility of approaches and responses with Human Rights and fundamental principles of law. Secondly, concerns have to be raised over the very origin of domestic non-criminal justice responses to criminal activity seems to have been to bypass procedural safeguards.<sup>628</sup> Furthermore, as detailed above, this study shows that existing non-criminal justice responses, utilized by domestic authorities to counter organized crime, raise concerns for incompatibility

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<sup>624</sup> See Hayek's insightful explanation of the Rule of Law: Hayek, Friedrich A, *The Road to Serfdom: with The Intellectuals and Socialism* (The Institute of Economic Affairs 2005), at p 57.

<sup>625</sup> Email from Jakob Thomsen for the General Secretariat of the Council of the European Union to author (24 July 2013).

<sup>626</sup> Ibid.

<sup>627</sup> Boister, N, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law*, 953, at p 959; Schloenhardt, Andreas, 'PalermoPalermoo on the Pacific Rim' (United Nations Office on Drugs and Crime August 2009), at p 15, 37 - 38, 288 - 289, and 296.

<sup>628</sup> Ayling, Julie, 'Criminalizing Organizations: Towards Deliberative Lawmaking' (2011) 33 *Law & Policy*, 149 at p 164. Citing Zedner. Zedner, Lucia, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems*, 174 at 175 - 176. Loughnan, Arlie, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)' (2009) 20 *Current Issues in Criminal Justice*, 457 at 458 - 459.

with fundamental principles of law and Human Rights.<sup>629</sup> Finally, the policy documents promoting non-criminal justice responses do not address the criticism that these kinds of responses have met, nor does the policy clearly emphasize the importance of compatibility of such responses with fundamental principles of law and Human Rights. In fact, the above mentioned statements about the need to balance fundamental right and freedoms against efficient law enforcement and prosecution, raise important concerns for the intentions of the Union to honour fundamental right and freedoms in its efforts to counter organized crime.<sup>630</sup> Consequently, concerns must be raised over compatibility of the promotion of non-criminal justice responses with Human Rights and fundamental principles of law.

## **Knowledge as basis for Transnationalization of Non-Criminal Justice Responses**

The final part of the criteria is to examine the knowledge base for the transnationalization of non-criminal justice responses.

The above examination shows the promotion by the European Union of non-criminal justice responses for countering organized crime to raise concerns much in line with those raised over the transnationalization of criminal justice responses under the system of Transnational Criminal Law.<sup>631</sup> Even more problematically, many of these issues have not been addressed in the context of the promotion of non-criminal justice responses. This might suggest that those developing and promoting non-criminal justice responses within the European Union were not sufficiently knowledgeable about the issues that have previously been raised with the system of Transnational Criminal Law. This in turn raises concerns for the knowledge base on which the promotion and development of non-criminal justice responses rests. Recent studies into the evidential basis of policymaking within the Area of Freedom Security and Justice suggest in fact

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<sup>629</sup> See this thesis examination of existing non-criminal justice responses, and concerns raised about compatibility with Human Rights, p 65 – 103.

<sup>630</sup> European Union, Commission of the European Communities, ‘Developing a strategic concept on tackling organised crime’ (European Union, June 2, 2005), at p 2; The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, at p 15.

<sup>631</sup> Boister, N, ‘Transnational Criminal Law?’ (2003) 14 European Journal of International Law, 953.

dependency on less than sound knowledge and lack of sound knowledge within the entire policy field.<sup>632</sup>

Joanna Parkin criticized policy making within the European Union's new Internal Security Strategy for being based on questionable evidence.<sup>633</sup> Her study shows the policy making to be based mostly on what she chooses to call 'agency generated knowledge', generated by Home Affairs agencies of the European Union. The study reveals why most of the knowledge that these agencies are producing should not be considered knowledge, but rather intelligence and why as such it should not be presented as grounds for evidence based decision making.

Parkin's study examined the agency generated knowledge and found it "... presents several shortcomings when measured against criteria of objectivity, scientific rigour, reliability, relevance and accuracy."<sup>634</sup> Methodology and information based on for this agency generated knowledge were frequently not made available for critical review. Furthermore, the information based on were frequently not gathered in accordance with any sound methodology, but provided by law enforcement institutions of the member states on a voluntary basis.<sup>635</sup> This is found to be problematic for lack of mechanism to ensure consistency in the selection of information that the research is to be based on, creating concerns for the objectivity and completeness of the information.

Additionally, the 'knowledge' being produced is kept beyond scrutiny, such as scientific assessment of the quality and reliability of the process or the information used.<sup>636</sup> This limits the field of expertise to the expertise that exists within the agencies. Consequently, the limited field of expertise and lack of critical review was found to generate risk for gaps in the knowledge base, unidentified flaws in the methodology or failure to identify relevant information or alternative interpretations.

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<sup>632</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe; Boswell, Christina, 'The political functions of expert knowledge: knowledge and legitimation in European Union immigration policy' (2008) 15 Journal of European Public Policy, 471.

<sup>633</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe.

<sup>634</sup> Ibid, p 33 and 40

<sup>635</sup> Ibid, at p 8.

<sup>636</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe, at p 36 and 40.

Furthermore, the agencies of the European Union Home Affairs claim to be a source of knowledge in the field and in unique position to create Europe wide knowledge, when in fact they are producing less than sound knowledge, and more in line with intelligence.<sup>637</sup>

Subsequently, Parkin's study suggests that policymaking within the subject area of internal security of the European Union is in fact largely based on intelligence portrayed as sound knowledge. This is problematic for a number of reasons.

Intelligence is neither scientific knowledge, nor evidence. Intelligence has even been described as an educated guess.<sup>638</sup> Where the intelligence is the best guess of what has or will happen based on some information but not necessarily based on evidence,<sup>639</sup> while evidence are necessarily subject to one or another standard of proof, generally excluding opinions and guesswork. Intelligence differ from scientific research in that it is not intended to acquire knowledge on a chosen subject.<sup>640</sup> Rather it is intended to provide educated guess of “. . . what has happened, is happening now, or could happen in the future”<sup>641</sup>, to direct the facilitation of effective intervention.<sup>642</sup> The analysis that create intelligence differ from research that create sound scientific knowledge in a number of ways, such as intelligence's need for speed, secrecy and professional trust, as well as being expected to include bias and guesswork.<sup>643</sup> While scientific research capable of creating or contributing to sound knowledge is “. . . measured against criteria of objectivity, scientific rigour, reliability, relevance and accuracy”<sup>644</sup>, as well as having to pass critically reviewed by academic experts in the subject field before being accepted for publication.<sup>645</sup> Consequently, scientifically sound knowledge has to be able to state what

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<sup>637</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe.

<sup>638</sup> Manget, Frederic F, 'Intelligence and Law Enforcement' in Loch K Johnson (ed), *The Oxford Handbook of National Security Intelligence* (Oxford University Press 2010, online version), chapter 12, at p 2. Johnson, Loch K, 'National Security Intelligence' in Loch K Johnson (ed), *The Oxford Handbook of National Security Intelligence* (Oxford University Press 2010, online version), chapter 1, at p 7.

<sup>639</sup> Ibid.

<sup>640</sup> The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new millennium [2000] OJ C124/1, p 6.

<sup>641</sup> Ibid.

<sup>642</sup> Ibid.

<sup>643</sup> Ibid. Johnson, Loch K, 'Introduction' in Loch K Johnson (ed), *National Security Intelligence* (Oxford University Press 2010), chapter 1, at p 7.

<sup>644</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe, at p 40.

<sup>645</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe, at p 33 - 34 and 40.



information is the basis for its conclusions, and how the said conclusions were reached from the information cited.

Finally, the agencies are found to rely predominantly on expert knowledge within the law enforcement and security professions, both for the gathering of information and processing of information, while independent academic research seems not to carry much weight.<sup>646</sup> This last point is found to generate three additional issues.

First, the ‘knowledge’ claimed to be created is generated in a closed circle of likeminded experts with similar experience and expertise, having similar goals and interests, while criticism based on related interests, goals and related experience or expertise is held at bay.<sup>647</sup> Examples of different interests, that might be necessary to given priority over efficient law enforcement interventions, would be: Civil liberty, fundamental rights, and proportionality.<sup>648</sup> Potentially valuable complementary expertise can for example be drawn from the fields of: Global governance, legal comparison, and different forms of social science casting light on the social problem and the effects of the proposed responses on that said social problem and the society at large.

Second, Parkin’s study finds intelligence to be circulated as knowledge in inter agency cooperation, and to policy decision makers, while sheltered from outside scrutiny.<sup>649</sup> This creates the problem that “. . . intelligence as ‘knowledge’ is being circulated, re-packaged and re-cycled inside and between agencies, becoming self-reinforcing, yet increasingly separated from its original evidence base.”<sup>650</sup>

Finally, the study identifies objectivity as a specific problem with creation of sound knowledge within agencies which existence and role so heavily relies on the decisions made on the basis of this same ‘knowledge’. The study finds agencies to be engaged with identifying problems and developing solutions that ultimately have established or strengthened the role of

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<sup>646</sup> Parkin, Joanna, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] CEPS Papers in Liberty and Security in Europe, at p 40.

<sup>647</sup> Parkin, Joanna, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] CEPS Papers in Liberty and Security in Europe, at p 33, 35

<sup>648</sup> Ibid, at p 33 - 36 and 40; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[2012] OJ C326/1, at p 15 - 16 and art. 2.

<sup>649</sup> Ibid.

<sup>650</sup> Ibid, p 40.

the agencies themselves.<sup>651</sup> This concerns for objectivity then escalates with the secrecy that prevents public discussion and review of the ‘knowledge’ and how it is produced.

Parkin insightfully points out that “. . . the question of ‘what is knowledge’ is intimately linked with the question of what constitutes objective evidence.”<sup>652</sup> Consequently, by introducing non-objective information as knowledge, such information can be mistaken for objective evidence.

Parkin’s study raises concerns for the knowledge base for the promotion of non-criminal justice responses by the European Union. As detailed in the chapter on transnational promotion of non-criminal justice responses<sup>653</sup>, the European Union is actively involved in developing specific responses and select best practices, practices that the Union then promotes amongst its member states.<sup>654</sup> The Union gets involved in this way, and is being called up on to do so by its member states, based on its unique position to facilitate sharing of information amongst the member states and ability of its supranational institution to create Union wide knowledge.<sup>655</sup> The knowledge created, as well as best practices selected on basis of that knowledge, are referred to in the legal instruments and policy documents created by the Union.<sup>656</sup> Subsequently, this creates legal obligations and soft law pressure for member states, to adopt the suggested policies, approaches and responses - potentially affecting domestic policy and norms.

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<sup>651</sup> Ibid, p 1 - 2, 6 and 40.

<sup>652</sup> Ibid, at p 33.

<sup>653</sup> This thesis chapter: Transnational promotion of non-criminal justice responses, p 104 – 109.

<sup>654</sup> European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012), in particular p 1; European Union, Presidency of the Council of the European Union, ‘Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward’ (European Union, December 6, 2011), in particular p 6; Hungarian delegation, ‘Complementary approaches and actions to prevent and combat organised crime’ (commonly referred to as ‘the Hungarian Handbook’) (European Union, May 30, 2011, at p 1; The Stockholm Program [2010] OJ C115/1, at p 20 – 21.

<sup>655</sup> Parkin, Joanna, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] CEPS Papers in Liberty and Security in Europe, 1, at p 39. The Council of the European Union, the Netherlands delegation, ‘Analysis Administrative/Non-Penal Instruments in various Member States & Proposal Future Steps’ (The European Union February 25, 2010), at p 24 - 25.

<sup>656</sup> European Union, Presidency of the Council of the European Union, ‘Multidisciplinary and administrative approaches to combat organised crime’, (European Union, April 4, 2012), at p 1; European Union, Presidency of the Council of the European Union, ‘Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward’ (European Union, December 6, 2011), in particular p 6; Hungarian delegation, ‘Complementary approaches and actions to prevent and combat organised crime’ (commonly referred to as ‘the Hungarian Handbook’) (European Union, May 30, 2011); The Stockholm Program [2010] OJ C115/1, at p 20 – 21.

Study of the publicly available documents about the selection and promotion of non-criminal justice responses at the level of the European Union shows Parkin's concerns to be relevant to the promotion of non-criminal justice responses.

First, the knowledge being generated at the level of the European Union about non-criminal justice responses as part of the Unions promotion of such responses seems to be predominantly generated by expert practitioners in law enforcement.<sup>657</sup> As pointed out by Parkin, law enforcement agencies have been criticized for fostering an occupational culture that might emphasize effective intervention over considerations criticizing or limiting such effective law enforcement.<sup>658</sup> This raises concerns for objectivity and impartiality of the knowledge created.

Regarding the concerns raised by Parkin about knowledge generated in a closed circle of likeminded experts, the Europol Platform for Experts has experts from outside the circle of law enforcement practitioners. However, available information does not reveal how extensive expertise is to be found within the forums of the platform, what forums have experts external to law enforcement agencies, and to what extent the platform influences the knowledge on which the European Union bases its work.<sup>659</sup> Secrecy cloaking the knowledge generated and how it is generated shelters from criticism and prevents external input.

The development of non-criminal justice responses at the level of the European Union seems to be based on information offered on voluntary basis from the member states about responses being or having been utilized by their domestic authorities.<sup>660</sup> No independent

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<sup>657</sup> The Council of the European Union, the Netherlands delegation, 'Analysis Administrative/Non-Penal Instruments in various Member States & Proposal Future Steps' (The European Union February 25, 2010). European Union, Presidency of the Council of the European Union, 'Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward' (European Union, December 6, 2011), at p. 4.

<sup>658</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe, at p 40; Heymann, Philip B, 'Two Models of National Attitudes Toward International Cooperation in Law Enforcement' (1990) 31(1) Harv Int'l LJ, 99, at p 102 – 104. See further on police subculture: Conser, James A, 'A Literary Review of the Police Subculture: Its Characteristics, Impact and Policy Implications' (1979) 46 2 Police Studies: The International Review of Police Development 1979-1980, 46; Herbert, Steve, 'Police Subculture Reconsidered' (1998) 36 Criminology, 343.

<sup>659</sup> The EUROPOL, official website <<https://www.europol.europa.eu>> accessed 11 January 2012. See on the Europol Platform for Experts: under Europol Expertise, accessed 4 July 2014.

<sup>660</sup> European Union, Presidency of the Council of the European Union, 'Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward' (European Union, December 6, 2011)

collection of information seems to take place, nor review of the information shared by the domestic expert practitioners. Additionally, concerns must be raised over the objectivity and impartiality of experts within agencies that are being affected by the policy or responses promoted.<sup>661</sup> These concerns can best be objected to with transparency and review of the work being conducted – unfortunately transparency is not part of the description of the process for the assessment and promotion of non-criminal justice responses at the level of the European Union.

Similar concerns as Parkin raised about self-reinforcing of less than sound knowledge by way of circulation between agencies of the European Union, must be raised over the Union's role in sharing information about non-criminal justice responses between the member states, as well as collection, assessment and selection of best practice at the Union level.<sup>662</sup> Concerns must be raised for the involvement of the Union to cause to some extent separation between the knowledge being shared and its original evidence basis. Additionally, emphasize on less than sound knowledge and lack of truly sound knowledge, may raise concerns for undue influence of the European Union, based on its own policy and interests of its agencies, on the information shared and the responses selected as best practices.

Finally, Parkin identifies objectivity as a specific problem for creation of sound knowledge within agencies, which existence and role relies so heavily on the decisions made on the basis of the knowledge being generated.<sup>663</sup> Such concerns for objectivity must, also, be raised over the knowledge about non-criminal justice response generated by national and supranational agencies that have, or are intended to play a role in countering organized crime or crime in general by utilizing non-criminal justice responses.<sup>664</sup> Additionally, different nation states seem to have different level of involvement in the knowledge generation. For example, the Hungarian handbook was created primarily by representatives of eight of the then 27 member

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<sup>661</sup> Sheptycki, James W E, 'The Accountability of Transnational Policing Institutions: The strange Case of Interpol' (2004) 19 Canadian Journal of Law and Society, 107; Sheptycki, James W E, 'Global law enforcement as a protection racket' in A Edwards and P Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge 2003), 42.

<sup>662</sup> The EUROPOL, official website <<https://www.europol.europa.eu>> accessed 11 January 2012. See on the Europol Platform for Experts: under Europol Expertise, accessed 4 July 2014.. 'Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward', December 6, 2011

<sup>663</sup> Parkin, Joanna, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] CEPS Papers in Liberty and Security in Europe, p 1 - 2, 6 and 40.

<sup>664</sup> The EUROPOL, official website <<https://www.europol.europa.eu>> accessed 11 January 2012. See on the Europol Platform for Experts: under Europol Expertise, accessed 4 July 2014.. 'Integration of EU initiatives on complementary approach in combating serious and organised crime – the proposed way forward', December 6, 2011

states of the European Union.<sup>665</sup> These concerns for objectivity then escalates with the secrecy that prevents public discussion and review of the knowledge and how it is generated. Furthermore, as noted by Parkin, knowledge is considered to represent objective evidence. Consequently, it seems misleading to represent non-objective information as knowledge.

Parkin points out how the Home Affair agencies are trying to establish themselves as “. . . ‘centres of expertise’ or ‘law enforcement knowledge bases’.”<sup>666</sup> The same seems to be the case with transnationalization of non-criminal justice responses, the European Union and its supranational institutions are trying to establish themselves as a basis for knowledge in the field, while at the same time ignoring established ideas about how sound knowledge is produced. Unfortunately, no attempts seem to have been made to establish why sound knowledge should be differently produced in the field of law enforcement than in other fields. Even if reference has been made to the importance of intelligence over scientific research, based on need for speed, secrecy and professional trust.<sup>667</sup> Unfortunately, secrecy and professional trust has frequently been misused and the need for prompt results seems not to be the only consideration for policies that have been developing for tens of years. Too much dependency of police on intelligence has been criticized.<sup>668</sup> Established principles for generation of scientifically sound knowledge and evidence seem therefore not to have been altered, objectivity, scientific rigour, reliability, relevance, accuracy, and critical review seem still to be at the heart of the creation of sound knowledge.<sup>669</sup>

The European Union’s contribution to the selection of existing non-criminal justice responses and development of new responses seems therefore to run into the same criticism, for

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<sup>665</sup> European Union, official website <[http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm)> accessed 4 July 2014. See: list of countries

<sup>666</sup> Parkin, Joanna, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] CEPS Papers in Liberty and Security in Europe, at p 40.

<sup>667</sup> Council of the European Union, General Secretariat, ‘Serious and Organised Crime Threat Assessment (SOCTA) - Methodology’, July 4, 2012, p 6.

<sup>668</sup> Sheptycki, James W E, ‘Organizational Pathologies in Police Intelligence Systems: Some Contributions to the Lexicon of Intelligence-Led Policing’ (2004) 1 Policing and Society, 307.

<sup>669</sup> Parkin, Joanna, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] CEPS Papers in Liberty and Security in Europe, at p 33 - 34 and 40.

lacking knowledge base and being based on less than sound knowledge, as the Union's policy making in the field.

Knowledge of non-criminal justice responses seems to be lacking and the knowledge relied on seems to be less than sound knowledge. Still the Union is appealing to its member states to adopt responses based on this work. Furthermore, the member states of the Union are seeking increased involvement of the European Union, and agencies of the Union are seeking to play a role in the promotion of non-criminal justice response. This reliance of the member states on the Union is likely caused by the claim of the European Union Home Affairs agencies to be in a unique position to create superior knowledge in this field due to their Union wide overview and access to information. Truly, the Union and its institutions are in a unique position to create superior knowledge, but this study indicates that this position is not utilized to generate objective, evidence based, and sound knowledge.

## **The elephant in the room: international promotion of non-criminal justice responses to organized crime – raises substantive and relevant concerns**

This study claims to have confirmed its presumption that domestic authorities are utilizing great variety of non-criminal justice responses to counter organized crime, and greater than existing academic literature suggests. Additionally, the utilization of this approach seems to be more wide spread worldwide than the literature indicates. The research shows domestic authorities in Australia, Canada, Iceland, and most or all of the member states of the European Union to be utilizing non-criminal justice responses.<sup>670</sup> In fact, non-criminal justice responses have become a major complementary approach for countering organized crime, and there seems to be reasons to think this approach is on the rise. However, existing literature on domestic non-criminal justice responses raises numerous concerns with both individual responses and the approach of utilizing non-criminal justice responses for countering organized crime and crime in general. These concerns have mainly to do with compatibility of the non-criminal justice responses with fundamental principles of law and Human Rights, as well as lack of restraint on the scope of the responses, to some extent due to difficulty with providing sufficient definition for the subject of the response.

Furthermore, the study found the European Union to utilize International Soft Law for the promotion of non-criminal justice responses to organized crime, both the approach as such and specific responses as best practice. Consequently, rejected its second presupposition, that non-criminal justice responses to organized crime were not part of international efforts for countering transnational crime, including organized crime. The soft law approach is found to create legal obligations as well as peer pressure, effectively influencing the member states to adopt non-criminal justice responses as a complementary approach to traditional criminal justice responses. Additionally, the Union can be seen to promote the utilization of non-criminal justice responses by facilitating information sharing between the member states, assessment and selection of best

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<sup>670</sup> The Council of the European Union, the Netherlands delegation, ‘Analysis Administrative/Non-Penal Instruments in various Member States & Proposal Future Steps’ (The European Union February 25, 2010), at p 4. See this thesis chapter: Domestic Non-Criminal Justice Responses to Organized Crimes p 65 – 103.

practices from existing practices and experience of its member states, and by contributing to the development of new and existing responses.

Surprisingly, no academic literature was found that discussed specifically this promotion of the European Union of non-criminal justice responses for countering organized crime, and little or no scientific research seems to have been conducted on this aspect of globalization of crime control under International Law. Transnational Criminal Law, claiming to be the main venue within the field of law for academic discussion about international efforts for indirectly suppressing organized crime through domestic law, seems to continue to exclude non-criminal justice responses and the effects of International Soft Law on domestic legislation. Consequently, much of the influence that International Soft Law and information sharing at the level of the European Union seems to have on domestic authorities adopting non-criminal justice responses for countering organized crime, goes largely unnoticed by the academic discussion about international efforts for countering organized crime.

These considerations seem to be of an importance as the examination conducted as part of this study shows the promotion by the European Union of non-criminal justice response to organized crime to raise concerns for incompatibility with fundamental principles of law and good governance. In fact the examination shows the promotion by the Union to raise concerns much in line with those that have previously been raised over the system of Transnational Criminal Law. This study argues these concerns to be caused by a combination of lack of sound knowledge and lack of emphasize on fundamental principles of law, Human Rights and good governance. The concern for lack of sound knowledge is base on academic researches finding lack of reliance on sound knowledge within the European Union's Area of Freedom, Security and Justice. Additionally, showing reliance on less than sound knowledge and intelligence, misconceived as sound knowledge.

Based on findings of lack of knowledge and incompatibility of the international promotion of non-criminal justice responses with fundamental principles of law, Human Rights and good governance, detailed in previous chapter, this study suggests pluralist thinking as a favourable approach to international efforts for countering organized crime.



The pluralist perspective suggested there to be real problems, both theoretically and practically, with creation of universal hierarchical normative order at the global or even regional level due to the diversity of the world's societies.<sup>671</sup> This is in line with academic writings in the field of Transnational Criminal Law that suggest harmonization of organized crime legislation to be a goal that would be hard to reach, due to the variety of social problems perceived to be organized crime, the diversity of organized crime legislations and lack of consensus amongst nation state about what kind of activities should be seen to constitute organized crime.<sup>672</sup> Academic discussions, although predominantly within the pluralistic school of thought, seem therefore to suggest that not only are domestic responses to counter organized crime designed to counter the particular social problem perceived to be organized crime in that particular jurisdiction, they are designed to work in a specific domestic social, economic and legal contexts. Pluralist legal thinking seems therefore to suggest that transnational harmonization is not the way ahead for international efforts to counter organized crime, in a “pluralistic-in-fact universe”<sup>673</sup> where “every legal system has its own society”<sup>674</sup>.

Finally, this study finds the European Union to be facilitating information sharing between its member states and influencing the development of non-criminal justice responses based on existing domestic practices and experience.

Existing academic writings suggest, however, that using practices and experience from one nation state to develop responses in another nation state, is a difficult and complicated process. Writing on pluralist legal thinking and legal comparison Zumbansen emphasizes the need for “interdisciplinary understanding of functionalist comparisons”<sup>675</sup>, in the appropriate

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<sup>671</sup> Walker, Neil, ‘Taking Constitutionalism Beyond the State’ (2008) 56 Political Studies, p 533 - 541. Krisch, Nico, ‘The Case for Pluralism in Postnational Law’ [2009] Law Society and Economy Working Papers, p 7 - 9 and 40 - 45.

<sup>672</sup> Calderoni, Francesco, *Organized crime legislation in the European Union* (Springer Verlag 2010), at p 120; Schloenhardt, Andreas, ‘Palermo on the Pacific Rim’ (United Nations Office on Drugs and Crime August 2009), at p 285 and 295.

<sup>673</sup> Rosenfeld, Michel, ‘Rethinking constitutional ordering in an era of legal and ideological pluralism’ (2008) 6 International Journal of Constitutional Law, 415, at p 442.

<sup>674</sup> R. Müllerson, *Ordering Anarchy: International Law in International Society* (2000), at 88. As cited by: Boister, N, ‘Transnational Criminal Law?’ (2003) 14 European Journal of International Law, 953, at p 969.

<sup>675</sup> Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 Global Constitutionalism, 16, at p 51.

context.<sup>676</sup> Consequently, an ‘interdisciplinary understanding of functionalist comparisons’ of the existing practices and experience needs to be reached, in their ‘appropriate context’ of both jurisdictions.<sup>677</sup> Subsequently, it should be possible to identify relevant similarities and differences, making it possible to see if and how one jurisdiction can draw from the other’s practices and experience.

Furthermore, the discussion suggests it to be scientifically flawed to promote the practices and experience from one jurisdiction as best practices, to be adopted by other jurisdictions, only based on assessment of the practices and experiences in that jurisdiction. Arguing that the implementation of the same practices in different jurisdiction may yield completely different experience, based on the domestic context. The European Union is found to be promoting best practices, seemingly based only on assessment of existing practices and experience in their jurisdiction of origin, encouraging its member states to adopt specific non-criminal justice responses.

Substantive concerns are therefore raised over the information sharing of existing practices and experience of non-criminal justice responses to organized crime, and promotion of best practices within the European Union.

This study claims to raise considerable and relevant concerns with current international efforts for the promotion of non-criminal justice responses for countering organized crime. Not because the utilization of non-criminal justice responses can not be a good approach to organized crime or criminal activities in general, but because the promotion of the approach and specific responses fails to rely on best available knowledge in the field and seems tainted by less than sound knowledge and lack of emphasize on Human Rights, fundamental principles of law and good governance.

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<sup>676</sup> Ibid; Zumbansen, Peer, ‘Transnational comparisons: theory and practice of comparative law as a critique of global governance’ in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), p 186.

<sup>677</sup> Ibid; Zumbansen, Peer, ‘Transnational comparisons: theory and practice of comparative law as a critique of global governance’ in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), p 186.

## Concluding Remarks

This thesis has been much critical on the current international efforts for the promotion of non-criminal justice responses for countering organized crime. However, this is not to say that the approach to counter organized crime by utilizing non-criminal justice responses can not be a good approach – only that current international efforts for promoting the approach raise concerns and deserve criticism.

This study has shown how practitioners are increasingly reaching out for non-criminal justice responses to counter organized crime. The main argument for the adoption of non-criminal justice responses seem to be that traditional criminal justice responses have proved to be insufficient in dealing with transnational and organized crime. This is in fact supported by academics that have argued traditional criminal justice responses to be neither well suited to deal with collective behaviour such as organized crime, nor criminal activities that transcends borders such as transnational crime. Additionally, development of criminal justice responses aimed at organized crime have meet criticism for unacceptably widening the scope of criminal liability, lacking the establishment of the fault requirement and bordering on guilt by association. Consequently, the development of non-criminal justice responses, for the purposes of prevention and deterrence, seems not that far fetched or unreasonable complementary approach to the traditional criminal justice response, seemingly struggling in this field. However, existing practices and experience have raised concerns, and some responses have even been found unconstitutional in their jurisdiction of origin. Furthermore, it is found to be unsettling how the introduction of non-criminal justice responses to counter organized crime seem to raise concerns that have been previously raised, either in another jurisdiction or in another context, such as the context of criminal justice responses for countering organized crime. Consequently, suggesting that the issue should have been addressed and potentially avoided in one way or another before implementation of the response – if the preparation and development of the responses were based on best available knowledge in the field.

These findings are not detrimental to the approach of utilizing non-criminal justice responses to organized crime – there are, however, concerns and issues that need to be addressed. Unfortunately, the policy documents and legal instruments, promoting non-criminal justice responses to organized crime within the European Union, were not found to discuss or even note

the issues and concerns raised with existing practices and experience. This in turn raises concerns for the international promotion of the approach not being guided by best available knowledge in the field. Consequently, it must be questioned if political assessment and decision making to promote the approach was based on sound knowledge.

Furthermore, the study raises substantive concerns for the existing international promotion of non-criminal justice responses to organized crime. Examination of the promotion raises substantive concerns with compatibility of the promotion with fundamental principles of law, human rights and good governance. It is unsettling that the examination was based on well known concerns and issues that should have been considered and addressed in such an important policy change as is the shift towards non-criminal justice approach to criminal activity, traditionally dealt with by way of criminal justice responses. Subsequently, raising again the concern for lack of sound knowledge in guiding the examination and promotion of non-criminal justice responses at the international level.

Finally, this study found research based evidence for the lack of reliance on sound knowledge in the policymaking and within institutions of the European Union's Area of Freedom, Security and Justice. These evidence seem to be reinforced by findings of this study, that best available knowledge is not sufficiently guiding the international efforts for promotion of non-criminal justice responses, selection of best practices and development of new responses. In fact, the development and utilization of non-criminal justice responses seems to be led by sharing of raw information and intelligence, rather than sound knowledge. Emphasis on intelligence in policing and for policymaking seems to have generated a widespread misconception of intelligence as a sound knowledge – causing intelligence to be extensively presented as best available knowledge.

Consequently, the promotion of the approach and existing practices seem repeatedly to raise known issues, apparently without existing knowledge being utilized to avoid those issues and develop legitimate and less contested practices. This study does not find against the international promotion of non-criminal justice responses to organized crime in general – it does, however, find existing efforts to ignore best available knowledge in the field and subsequently run into known issues.

The main conclusion of this thesis is, therefore, that sound knowledge is lacking about non-criminal justice responses to counter organized crime and that existing best available knowledge in the field is not relied up on.

This lack of reliance on best available knowledge seems to be caused by a culture of reliance on intelligence amongst policymakers, law enforcement and security personals. This culture leads to misconception of intelligence as sound knowledge and reliance on intelligence style analyzed and assessments for decision making. As intelligence is neither knowledge nor evidence, this leads to decision making that runs into known issues and concerns. While evidence based decision making based on best available knowledge should be capable of identifying potential issues and concerns, in order to address them in a way that would avoid the issues or justify the approach taken.

Consequently, public discussion is needed about the present shift from traditional approach of countering crime with criminal justice responses, towards utilizing non-criminal justice responses for countering criminal activities, such as organized crime, and the problematic international promotion of the approach. The lack of reliance on sound knowledge and overreliance on less than sound knowledge must be exposed. Hopefully, such public discussion can lead to public and political pressure, capable of leading to policy and practices in the field become more compatible with fundamental principles of law, human right, good governance and the best available knowledge.

Such knowledge based development of non-criminal justice responses to criminal activities such as organized crime would do well to learn from knowledge in the field of Transnational Criminal Law and Global Governance, showing the problems with realization of universal norms and the potentials of more pluralistic approach. Pluralist legal thinking might then guide the sharing of information about practices and experience of domestic non-criminal justice responses, based on sound knowledge, preferably realized by “interdisciplinary understanding of functionalist comparisons”<sup>678</sup>, in the appropriate context.<sup>679</sup> Potentially such

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<sup>678</sup> Zumbansen, Peer, ‘Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order’ (2012) 1 Global Constitutionalism, 16, at p 51.

development would be capable of furthering the development of domestic non-criminal justice responses that would fit the perceived problem and the context of its own jurisdiction. Capable of bringing about responses that are effective in countering the perceived problem, while compatible with fundamental principles of law, Human Rights and good governance. After all, being tough on crime is not 'cool' if you end up losing in court – found yourself to have violated fundamental principles of the society you thought you were serving and protecting.

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<sup>679</sup> Ibid; Zumbansen, Peer, 'Transnational comparisons: theory and practice of comparative law as a critique of global governance' in Jacco Bomhoff and Maurice Adams (eds), *Theory and Practice in Comparative Law* (Cambridge University Press 2012), p 186.

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*Personal communications*

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